

United States
Circuit Court of Appeals
For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellant,

vs.

M. C. SCHAEFER, an Individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Appellee.

and

A. J. GOERIG and CLYDE PHILP,
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellee.

and

SAM MACRI, DON MACRI and JOE MACRI,
Appellants,

vs.

M. C. SCHAEFER, an Individual doing business as
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Appellee.

Transcript of Record
In Five Volumes
VOLUME III
Pages 949 to 1428

Upon Appeals from the District Court of the United States
for the Eastern District of Washington
Southern Division

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(Testimony of Allyn R. Hunter.)

The Court: He isn't saying that. He's saying that there's no evidence of any definite time or any evidence of definite quantity or amount or time on each of these various elements that have been testified to that caused the delay.

Mr. Olson: That's correct, your Honor.

The Court: It is not shown how many hours are lost on one structure or another one, and so on. I think that is his point, that since there isn't a detailed definition of the evidence, that there couldn't be any exact opinion evidence as to the amount the costs have been increased.

Mr. Olson: Yes, but your Honor, the thing they are going on is that they want to segregate it, they want to take the contract price of so much and then place a separate and distinct value on those delays, and that's [1027] not the theory of our case. We're not limited to that, and they know, as we do, your Honor, that it is a physical and practical impossibility for anybody on this job to divide between the time it takes to put that form in how much of their time that they spent as carpenters in putting in the form if they hadn't been hampered by that bank, and how much of the time on each excavation was used up because of the bank being in the way, and the hole not being ready, so we go on this general testimony, your Honor, that had these things been done right, and I realize I'm using that word "right" loosely, but the Court understands me, that it could have been all done in four months, which, your Honor, wouldn't have carried this job over the

(Testimony of Allyn R. Hunter.)

winter, and it is by virtue of the fact that instead of being able to do that we were held up thirteen months, I'm asking this witness if he can't evaluate within the confines of two or three times. If he can come that close to it, now, if the witness can, and he's an expert, if they can tear down his testimony on cross-examination let them try. Counsel says he can evaluate that cost just as good as this witness can. Maybe he can; I can't. It seems to me it is proper to go into that for the purpose of substantiating in a general way what our costs were on this project.

Mr. Hawkins: The plaintiff comes into court seeking [1028] to recover a certain amount of money, and it seems to me in this case as in all cases it must be established to a reasonable certainty what that figure is. I contend it cannot be done in the manner in which counsel is trying to do it. As a matter of fact, the State Supreme Court has held in many cases that even though there is a breach of contract and there is some damage flowing from it, if the damage is too speculative and uncertain, no substantial allowance of damage will be made. There has been no showing here whatsoever that the Concrete Construction Company had any prior experience with this type of construction, and that they could have performed it for a certain cost. That is purely in the realm of speculation, what they could have done this job for had Maeri done so and so. It is just simply guess-work, nothing more or less. Along that line, our Supreme

(Testimony of Allyn R. Hunter.)

Court, in quite a line of cases, has held that where the damages are speculative, no recovery can be had. *Binham vs. Walla Walla*, 3 Wash. Terr. 68; *Webster vs. Beau*, 77 Wash. 444; *Lockett Cap Co. vs. Globe Mfg. Co.*, 158 Wash. 183; *Hole vs. Unity Petroleum Corp.*, 15 Wash. (2d) 416. In each one of these cases there was a breach of contract preventing the other party either from performing the contract or doing certain things. In each one of those cases the Court held the damages were too [1029] speculative to be allowed, because they couldn't be ascertained with reasonable certainty. I submit to the Court here we have an expert witness testifying in response to a hypothetical question, and purporting to give with some degree of mathematical certainty the increased cost. I contend on the matters set forth in the question, indeed, on this record, no one, no matter how well qualified he is, could testify how much the costs were increased or how much less they would have been had it been done according to the specifications. I submit while it is true in many instances it is merely a matter of cross-examination to bring these points out, in this case there is not sufficient testimony of sufficient mathematical exactitude for this witness to base such an answer as counsel is calling for, and I submit, therefore, that the question is wholly improper, and our objection to it should be sustained.

Mr. Ivy: Your Honor please, the position of the bonding company was set forth in the brief

(Testimony of Allyn R. Hunter.)

that I handed to the clerk for you earlier in the case. The statement of counsel that they are unable to segregate the costs that they are alleging in their first cause of action by reason of the oral contract clearly brings this case within those cases cited to your Honor. It would seem to me that as far as the bonding company is concerned, in [1030] view of the statement of counsel to the Court in his argument, the bonding company cannot be held for damages under the cases already cited to your Honor. Their bond is a performance bond for labor and material, and not for damages, even though their alleged damages are measured by labor and material over and above what they would have been required to incur had they been able to proceed under the ideal conditions or the normal conditions that they anticipated. Certainly in view of the statement of counsel the bonding company should be dismissed from the case, because counsel has admitted to your Honor that he is unable to segregate the labor and material under which the bonding company and its performance bond could be held.

Mr. Olson: Your Honor, in answer to that, I didn't make any such statement, that I could not segregate labor and materials; neither did I use the word "damages". If I were suing for damages for breach of contract, I've got a lot of damages we sustained that are not in this case, just a lot of them. The thing I'm suing for, I'm suing for labor and materials and services that went into this job,

(Testimony of Allyn R. Hunter.)

and the bonding company is liable for every cent of it. Now, the statement I did make, your Honor, that it is impossible to take your contract and say that it covered for a certain amount of [1031] labor and materials, and to divide, structure by structure, the part of the services rendered that were rendered if the sub-contract had been complied with by Mr. Macri and the amount of them that were the result of his non-compliance, but I am able to show the cost and the reasonable value of the services and materials that went into this job, and were required to go into it by virtue of Mr. Macri's failure to comply with his contract, not on the theory that it is damages for his breach; it is our position that by reason of his failure to perform this contract, that contract went out the window. I take this position on two grounds; first, that there was an oral agreement, all the testimony isn't in on that, which in itself abrogated the contract. It is our position that even in the absence of the agreement, when Mr. Macri failed to live up to his part of the contract, that contract became abrogated, and that we are then entitled to sue on the theory of quantum merit for the labor, materials and services that went into this job. If this witness can testify to it, your Honor, within those confines, he's entitled to do it. If I put Mr. Schaefer and our accountant on the stand and simply testify to the costs, is it to be believed that there is no way at all to check those figures? They intend to show our costs were out of line and we didn't know what

(Testimony of Allyn R. Hunter.)

we were doing. It is to meet [1032] that contention that I want to show by these experts that our actual costs were to be reasonably anticipated and expected by virtue of the fact that this job was held up this length of time.

The Court: Will you read the last question?

(Whereupon, the reporter read the last previous question.)

The Court: I'll overrule the objection.

Mr. Hawkins: For the purpose of the record, counsel's argument suggests another theory I would like to submit at this time. Goerig and Philp under the termination agreement agreed to pay any financial loss to Mr. Macri, sustained by him by virtue of the prompt fulfillment of his contracts. Now then, if counsel's position is based either upon a breach of this original written contract or upon a breach of an oral contract made sometime later, we, Goerig and Philp, cannot be bound to the plaintiff, because the very condition under the termination agreement upon which our liability would arise must of necessity not obtain; that is, if Macri failed to perform, then Goerig and Philp are not liable, under the very wording of the termination agreement, and therefore we again object.

The Court: Of course, I'm not decided the lawsuit or any part or portion or phase of it at this time. [1033] I'm simply trying to determine what is material to be allowed here by way of evidence bearing on the issues, and if this is material as to

(Testimony of Allyn R. Hunter.)

any party, it should be permitted to go in, and the effect will have to be determined afterwards.

Mr. Holman: Since my co-defendants have taken various positions, I would like to state with respect to Macri that we move this question be stricken on the ground and for the reason it is not predicated upon written notice of any cost as required by the sub-contract.

The Court: Well, it will be denied, the motion to strike.

Mr. Olson: He hasn't answered it yet.

The Court: Well, I suppose he was referring to the preceding answer.

Mr. Holman: I understood he had answered.

The Court: No.

Mr. Holman: Well, then, I'll withhold that until he does answer.

The Court: All right, you may answer. The question is whether you can express an opinion.

Witness: I feel that a person could express it; I feel I can express it.

Q. Well, then, will you do so now, Mr. Hunter?

The Court: And the record will show that the same [1034] objections are made to this as to the preceding question.

Witness: I feel that it would raise your costs from two to three times.

Mr. Holman: And the motion to strike, your Honor, is directed to that.

The Court: It will be denied.

(Testimony of Allyn R. Hunter.)

Q. Now, Mr. Hunter, having in mind the structure layout plans, plaintiff's Exhibit 12, and the specifications covered in 1062, plaintiff's Exhibit 3, and assuming that the lumber was furnished on time and of a suitable quality for the work as called for by the two exhibits mentioned, and assuming that the excavations were made with the lateral clearance of at least a foot on the foundation of the structures and with a slope to the bank of 1 to 1, and made available so that the structures could be put in place without delay, and in short, so that the job could have been completed, as you testified before, in your 70 to 75 working days, what in your opinion, Mr. Hunter, would be the reasonable cost or reasonable value of the concrete installation, concrete pouring into the structures, the building of the forms, and the removal of the forms, and the stripping operations, and including the furnishing of the curing materials and the furnishing of the form wire and nails?

A. That didn't include the aggregate or cement?

Q. Not including furnishing the aggregate or cement.

Mr. Hawkins: I didn't know the question was completed, your Honor. Would the reporter read the question again?

(Whereupon, the reporter read the last previous question.)

Mr. Hawkins: Well, I object to that question, your Honor. I don't know what the reasonable value of those items has to do with this case.

(Testimony of Allyn R. Hunter.)

The Court: You're asking for cost or value. Did you have in mind cost, or value, or both?

Mr. Olson: Well, I have in mind the value, your Honor. Frankly, I have in mind the Miller Act. The Circuit Court of Appeals case uses the same language; that's exactly what they used, cost or value.

The Court: Do you have an objection, Mr. Holman?

Mr. Holman: Yes, I do, your Honor. I object for the reason that the hypothetical question does not incorporate the plans and the specifications and the sub-contract, which incorporates the principal contract by reference in its entirety, and the specifications. In other words, this witness is being asked what the job would be, done without regard to the specifications.

The Court: I thought it was based upon his knowledge of the specifications. [1036]

Mr. Holman: This question did not.

The Court: Read it again. It did, I'm sure. You said based upon your knowledge of the specifications and lay out plans.

Mr. Holman: It's hard to keep it all in one.

(Whereupon, the reporter read the first portions of the last previous question.)

The Court: That's enough; the objection is overruled.

Mr. Holman: But it still doesn't take the sub-contract in, your Honor. I have this in mind. If counsel is asking this hypothetical question based

(Testimony of Allyn R. Hunter.)

upon the assumption that the sub-contract has been superseded by some oral agreement, then that is one thing, but if he's basing it upon the sub-contract rights with due regard to the specifications, then the question is deficient in that.

The Court: Overruled.

Mr. Hawkins: And your Honor, this witness is not qualified to testify as to the value or cost of these materials. There is no testimony he was operating on that market at that time, or had any knowledge of it.

The Court: Well, he's testifying as an expert engineer and construction man who for many years had charge of a construction company. I assume that he's [1037] qualified as an expert. Overruled.

Direct Examination

(Continued)

By Mr. Olson:

Q. Do you have in mind the question, Mr. Hunter?

A. I think I have, yes. Well, I think that the bid which was made out by Mr. Schaefer, which I saw myself at the time the bid was made out, was ample——

Mr. Hawkins: Well, I object to that.

Mr. Olson: Let's let him finish.

Mr. Hawkins: It is not responsive.

Mr. Olson: Well, it might be.

Mr. Hawkins: Will you let me complete my motion, counsel? It shows that this witness is bas-

(Testimony of Allyn R. Hunter.)

ing his opinion solely upon Mr. Schaefer's bid, and upon what Mr. Schaefer thought was proper under the circumstances at that time.

The Court: Well, he didn't finish. I suppose he was going to say that was his opinion of what the value would be, but his opinion, I think, should be expressed without reference to the contract bid.

Mr. Hawkins: Yes, that's true if he has one independent of the amount bid.

The Court: Yes, that's true. Perhaps you had better ask the question again.

Mr. Olson: I take it the answer is stricken, is that right? [1038]

The Court: Yes, that portion of it is stricken.

Direct Examination
(Continued)

By Mr. Olson:

Q. Well, then getting back to the question which I propounded, Mr. Hunter, what in dollars and cents would be your answer?

Mr. Hawkins: Well, your Honor, I object to that. This witness doesn't know how much was furnished out there. There is no testimony, in fact, in this whole record as to how much material was out there, or how much work was done, and this man testified he only saw six or seven of those structures out there; how on earth can he possibly know and testify to a thing of that kind?

The Court: He's testified he's gone over the plans and specifications, including the layout, and

(Testimony of Allyn R. Hunter.)

knows what is required. I've ruled that he is an expert engineer. He'd be qualified to testify what in his opinion would be the cost or value of these concrete structures under counsel's question, and I'll overrule the objection and let him answer.

Q. Will you proceed, Mr. Hunter?

A. At the time this job was estimated I worked up the figures myself on it, and had somewhere in the neighborhood of \$26.00 or \$27.00 as a final figure; that is excluding the aggregates and cement and lumber.

Mr. Holman: I move that answer be stricken as [1039] not responsive.

Mr. Olson: Let me follow that up.

The Court: All right.

Direct Examination

(Continued)

By Mr. Olson:

Q. Is that, in your opinion, Mr. Hunter, the fair and reasonable cost or value of those services referred to in my question? A. It is.

Mr. Olson: You may examine.

The Court: I assume that \$26.00 or \$27.00, was that a cubic yard of concrete? I just want to be clear on it.

A. Cubic yard.

Q. (By Mr. Olson): Does that refer to cubic yard of concrete? A. Cubic yard.

Mr. Olson: You may examine.

(Testimony of Allyn R. Hunter.)

Cross-Examination

By Mr. Holman:

Q. In your answer to the last question, Mr. Hunter, when you say the bid price of \$26.00 per cubic yard is a fair price as of the time of the operation under the contracts, do you refer to item 12 of the bid items, or do you refer to all of the operations assumed under the sub-contract by Mr. Schaefer?

A. That takes the forms, concrete pouring and finishing all into—— [1040]

Q. Would you answer my question, please? Do you refer to item 12, which is concrete structures, among the bid items in the contract and specifications, or do you refer to all of the work assumed by Mr. Schaefer under the sub-contract?

Mr. Olson: That question is objected to, your Honor, as not being proper in that it relates—I'm objecting particularly to that part "does it relate to all of the obligations assumed by Mr. Schaefer?"

Mr. Holman: I said all the items.

Mr. Olson: We don't know what they are, and can't be told from that question.

Mr. Holman: This witness has said that he made Mr. Schaefer's bid up, that he went over it with him at the time.

The Court: That answer wasn't permitted to stand.

Mr. Holman: Oh, I forgot that.

(Testimony of Allyn R. Hunter.)

The Court: He said he went over it and made estimates at the time; he didn't relate it to Schaefer's bid. He concluded that \$26.00 or \$27.00 was a reasonable figure.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Yes, but what I want to know, is that \$26.00 or \$27.00 confined to item 12, concrete structure, or does it include the items undertaken by Mr. Schaefer's sub-contract? [1041]

A. The items undertaken by Mr. Schaefer's contract.

Q. All right, then. Mr. Hunter, I believe you said you were the owner of Rogers Insurance Agency in Portland? A. Yes, sir.

Q. And as such you wrote the indemnity bond to Mr. Macri on the sub-contract in question here, correct?

A. I wasn't the owner at that time.

Q. Oh, not as such, but you did write the bond?

A. Yes, sir.

Q. Handing you Macri's Exhibit 34, is that the form and the manner of execution in which you wrote and delivered that bond?

Mr. Olson: This is objected to as being wholly immaterial, and proves no interest in this case.

Mr. Holman: That is a matter of interest of this witness, your Honor, how he wrote that bond.

(Testimony of Allyn R. Hunter.)

The Court: It is in evidence here; I'll overrule the objection. I don't see the materiality of it.

Witness: I didn't deliver this bond to Mr. Schaefer.

Q. You didn't, sir? A. No, sir.

Q. So you wouldn't know?

A. It was mailed by Mr. Rogers.

Q. So you do not know the particulars?

A. Of the bond? [1042]

Q. Yes. A. I did, yes.

Q. And did you know it was delivered without the principal signing it?

Mr. Olson: Same objection, your Honor. There is no suit on this bond here.

Mr. Holman: No, there is not, but I'm going to the question of the interest of this witness.

The Court: Would he be more interested with an unsigned bond than he would be with one that is signed?

Mr. Holman: Not yet, your Honor.

The Court: I'll sustain the objection.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, you negotiated and consummated this transaction of the bond, did you not?

A. Yes, sir.

Q. Do you have with you or can you produce the application for that bond?

(Testimony of Allyn R. Hunter.)

Mr. Olson: I submit the same objection, your Honor. I don't see any materiality.

Mr. Holman: Well, I intend, your Honor, to show by this witness a definite interest in the results of this case, from that very question.

The Court: Well, I'll permit you to pursue it further, then. Overruled. [1043]

Witness: I couldn't say as to whether I could produce that or not. I would have to go to the bonding company.

Q. You do not have it with you?

A. No, sir.

Q. Can you produce that, sir?

A. I'm not sure what the bonding company's attitude is on those applications at all.

Q. Did you secure the application?

A. I think it was sent with the bond, and probably mailed back.

Q. Did you have Mr. Schaefer sign an application for the bond, sir?

A. I didn't personally, no.

Q. Who is the person who would have the application, Mr. Hunter?

A. The Glens Falls Indemnity Company.

Q. Yes, and where would that be with respect to subpoena?

A. Either in San Francisco or New York.

Q. Do you have any copy in Rogers and Company?

A. We do not.

Q. Can you tell me whether or not—did you see the application, sir?

A. I don't think I did.

(Testimony of Allyn R. Hunter.)

Q. Do you have the form of application that you used for the Glens Falls Indemnity Company bond?

A. I don't have one with me.

Q. Can you produce one?

Mr. Olson: Your Honor, I don't see——

Mr. Holman: My point is this——

The Court: Just a moment; Mr. Holman?

Mr. Holman: That the Glens Falls Indemnity Company, just as already illustrated to your Honor by the Continental Casualty Company, has in its possession an application for this bond, and judging from what is now before your Honor in the Continental Casualty Company, that application itself contains an assignment of all interest of Schaefer, and that's what I want to produce.

Mr. Olson: Your Honor, I don't know of any assignment of all interest that appears here as far as the Continental Casualty Company is concerned; in the application for the bond Macri agreed to indemnify the Continental Casualty Company against any loss. Now, if Glens Falls Bonding Company was a party defendant, and this bond was being sued upon, and they had something at stake, some possible judgment entered against them, then I think counsel would be able to show the witness's interest, because he would be trying to protect the bonding company. Nobody's suing the Glens Falls. He completed this job, and having completed it, the bond certainly must have been exonerated, because there is no [1045] claim against them. I fail to see any interest. When he went

(Testimony of Allyn R. Hunter.)

out on the job, there was a contingent liability on the job, but now the work having been completed, there is no contingent liability, or they would be suing on it.

Mr. Holman: I would like to make the request now, into the record, while he's here and available under the jurisdiction of this Court, that he produce a copy of the application for bond of Mr. Schaefer for part of the defendant's case.

The Court: Well, I'd have to have some indication of its materiality. There is no contention but what this sub-contract has been completed, is there?

Mr. Holman: No, not at all, your Honor, but there is a contention as to whether or not the proceeds of the sub-contract have been assigned to the Glens Falls Indemnity Company.

Mr. Olson: Is it your contention that the Glens Falls Indemnity Company have advanced some money on this case?

Mr. Holman: I strongly suspect it, yes, but I can't prove it.

Mr. Olson: Your suspicions are entirely unjustified.

The Court: I don't believe your application for the copy of the bond application is timely, Mr. Holman. [1046] You should have made application for that before the trial, it seems to me, if you had this thought in mind, and inquired into it then.

Mr. Holman: I couldn't, your Honor, because until the surety, the Glens Falls Indemnity Company, presented themselves in some form, I had no way to put process on them. They were not a party.

(Testimony of Allyn R. Hunter.)

The Court: I can't inquire into collateral matters with each witness. You can ask him if it's been assigned to his company.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Does the application contain an assignment clause?

Mr. Olson: I object.

The Court: I think that is objectionable. It might have an assignment clause. The question is whether this man's company has an interest in this lawsuit.

Q. Are you in position to answer for the Glens Falls Indemnity Company, or were you just a general agent? A. I'm a general agent.

Q. I submit he's not in a position to answer, your Honor. Mr. Hunter, you said you were with the State Highway Department in Oregon?

A. Yes, sir.

Q. When? A. 1922, '23 and '24. [1047]

Q. And what capacity?

A. Started in as an inspector, instrument man, assistant resident engineer, and resident engineer.

Q. Then at least for the time that you became a resident engineer for the State of Oregon you had to do with contracts and specifications, did you not, Mr. Hunter? A. Yes, sir.

(Testimony of Allyn R. Hunter.)

Q. And I believe you said you were—I can't read my own writing—you had an engineering capacity with the Bureau of Public Roads?

A. Superintending engineer, engineering superintendent, I think it is called.

Q. That would hold through there also?

A. Yes, sir.

Q. And when were you with the Bureau?

A. 1925-6-7.

Q. Yes, sir. Then you spoke of the Owyhee Project; that is an Idaho project, is it?

A. It is an Oregon project. It is a Bureau of Reclamation project.

Q. Reclamation project, yes, sir, and you had to do with the specifications in making up your estimates for Eck and Lind on that, did you not?

A. Yes, sir.

Q. Now, with respect to your engineering experience in those [1048] fields, can you tell me whether or not it is customary to measure quantities by computation as against actual measurement in the field, from the engineering viewpoint?

A. It is done in bridge work, culvert work, and such as that; in lots of cases it is by actual excavation, and some places by computations.

Q. For instance, in through cuts, in highway cuts, it would be measured by quantity?

A. Cross section.

Q. And average in areas, would it not?

A. Yes, sir.

(Testimony of Allyn R. Hunter.)

Q. And that is regardless of either overbreak or under-excavation, is it not?

A. Not in all cases, no, sir.

Q. Now, there is also the element of swell of earth and swell of rock and settling of earth that is involved too, isn't there, in those computations?

A. In some specifications they require an overbreak and a swell. In some cases they don't.

Q. Yes, sir; those things are all taken into consideration in computation to determine pay quantities, are they not?

A. Yes, sir.

Q. And in those instances it is the determination of the computation, and not the actual field measurement, that determines, correct? [1049]

A. No.

Q. That is not correct, sir? You say they would measure overbreak in solid rock, and pay?

A. They allow in the specifications, as a rule, they have an item for so much overbreak, in some specifications. Other specifications they don't allow any.

Q. They measure to neat lines, do they not, sir?

A. They measure to slope lines.

Q. They measure to slope lines?

A. To slope stakes; might not be——

Q. Don't they generally measure to neat lines, and haven't they in all your experience?

A. Not in your grading excavation.

Q. Not in your grading excavation?

A. No, sir; in your structural excavation they do measure it.

(Testimony of Allyn R. Hunter.)

Q. You state that as an engineer, that's the practice?

A. In most cases, yes, in rock work.

Q. Now, we're talking about earth.

A. In dirt work they use both.

Q. They pay to neat lines, don't they?

A. No, because you don't have a neat line all the way through.

Q. What is the function of the neat line in computations?

Mr. Olson: I don't see the materiality to go into a long dissertation of how they paid and figured excavations for payment on highway work. [1050]

Mr. Holman: I'm asking as to general engineering now, the function of the neat line in his experience.

The Court: Well, I'll overrule the objection. I don't see where it is leading.

Cross-Examination

(Continued)

By Mr. Holman:

Q. What is the purpose of the neat line?

A. The neat line is to a certain line that they're excavating to, or pouring to, or constructing to.

Q. Isn't it a fact the neat line is the limit of the pay quantity there, sir? A. Not in all cases.

Q. Isn't it a fact in reclamation work, sir?

A. As far as I know, in reclamation work.

Q. Yes, sir. Now, you told counsel when you first came to this job that you got down in a hole

(Testimony of Allyn R. Hunter.)

with Mr. Waltie and measured the approximate yardage in the hole, the distance out, the length, that it was not long enough and not wide enough for structures; do you remember that?

A. Yes, sir.

Q. Isn't it a fact that the hole that you got down in was a hoe excavation only, before it had been hand graded?

A. Yes, sir.

Q. Yes, sir. In other words, you didn't get down in a hole in which the excavation had been completed, including the fine grading? [1051]

A. No, sir.

Q. All right, sir. Where was that hole? Here are the layouts. Can you tell me that hole?

A. No, sir.

Q. Why can't you, sir?

A. We looked over several of them, and I wouldn't attempt to tell you where the hole was, or the number of it.

Q. What lateral was it on?

A. I couldn't tell you the lateral it was on.

Q. What distance was it from the shop?

A. Maybe two or three miles, maybe four miles.

Q. And did you stay on the same lateral when you walked the half mile you spoke of?

A. No, we were on two different ditch lines.

Q. Is there any structure layout in this Exhibit 12 that you can identify now to the Court as one that you inspected?

A. No, I can't.

Q. Did you make any notes of the structure with respect to the layout?

A. No, we——

(Testimony of Allyn R. Hunter.)

Q. Never mind "we". You, sir. A. No.

Q. Did you keep any diary, sir, of that?

A. Pertaining to that structure?

Q. Yes, sir. [1052] A. No, sir.

The Court: Well, we'll take a recess for ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. In this hole in which you say you got down with Mr. Waltie and measured the approximate yardage in the hole, the distance out, the length of it, it was not long enough and not wide enough for the structure, did you consult the layout of structures at the time? A. We did.

Q. Can you tell me—yes, again you say we; I'm talking about you, sir. A. I did.

Q. You, sir? A. Yes.

Q. And can you tell me what structure?

A. I can't at this time, no.

Q. Can you tell me how deep that excavation was? A. Just only by memory.

Q. Have you a memory on it, sir?

A. I would say it was around four foot deep.

Q. And can you tell me how wide it was? [1053]

A. Oh, probably in the neighborhood of four to five foot wide, maybe six.

(Testimony of Allyn R. Hunter.)

Q. And can you tell me how long it was?

A. Probably ten, eight to ten feet long. Those are estimated figures, because I don't remember.

Q. That's memory, without any notation, sir?

A. Yes, sir.

Q. And neither you nor Mr. Waltie made notations at the time?

A. Mr. Waltie was just trying to show me——

Q. Pardon me; will you answer my question, please? A. No, we didn't.

Q. All right, sir. Did you take a notation of the structures you looked at in the field——

A. No, sir.

Q. ——with Mr. Waltie on that day?

A. No, sir.

Q. And I believe you said you couldn't tell me even which lateral it was on? A. I could not.

Q. Isn't it a fact that you had one meeting with Macri only, you? A. Yes.

Q. And that's the one that you detailed in your direct examination? [1054] A. Yes, sir.

Q. Before and after lunch? A. Yes, sir.

Q. With whom did you take luncheon, Mr. Hunter? A. Mr. Hendershott.

Q. That's the auditor of Schaefer. Who else?

A. Mr. William Schaefer and Mr. Darcy.

Q. Mr. Darcy, yes, sir. Now, I'll ask you whether or not during the luncheon time your memory was refreshed with respect to additional conversation with Macri? A. No, sir, it was not.

(Testimony of Allyn R. Hunter.)

Q. And that's while you were still on the stand that you had luncheon with these gentlemen?

A. Yes, sir.

Q. Did you have any conversation with Mr. Macri, yourself, alone on that day?

A. Yes, sir.

Q. What was the nature of that?

A. Oh, I talked to him in regard to trying to expedite the work.

Q. Yes, sir. I'll ask you if this is not what you said, sir: —

Mr. Olson: I suggest he let the witness answer the question, your Honor. He asked what was said, and the witness started—— [1055]

Q. Weren't you through with the answer?

A. I was not.

Q. I beg your pardon, sir.

A. I talked to him with regard to expediting the work, explained to him how the forms were drying out, and I think I mentioned that he and Mr. Schaefer were both up on their ear to a certain extent, and that if they would get together and try to get to going that the thing would move faster.

Q. And didn't you make this statement, in substance, that it is usual for a subcontractor to complain? A. To Mr. Macri, do you mean?

Q. Yes. A. Not to my knoweldge.

Q. And didn't you make this statement, in substance, to Mr. Macri, that "I don't understand why Schaefer doesn't go ahead with this job, instead of hollering about it"? A. I certainly did not.

(Testimony of Allyn R. Hunter.)

Q. I am fixing the time, sir, and fixing the place, while you and Macri were walking back from that job, did you have any such conversation, sir?

A. No, sir.

Q. Where do you say that Mr. Macri made that statement "I'll take care of any costs in regard to fine grading, additional expenses on forms, and additional expenses to [1056] you; no man has lost any money on Macri's job, and you are no expectation"; where did he make that statement?

A. He made that statement to Mr. Cohen, Mr. Schaefer, Fred Waltie, and myself.

Q. Where? A. Out on the job.

Q. Where on the job?

A. Out where we looked over these laterals, and——

Q. You mean excavations?

A. Excavations on the laterals.

Q. And on that same day? A. Yes, sir.

Q. Now, that's the statement you made after lunch that you didn't think of this morning, is it not?

Mr. Olson: That's argumentative, your Honor.

A. That's a question that was asked me after lunch.

Q. Yes, sir, and you didn't answer as to that in the morning; you didn't recall that in the morning, did you?

Mr. Olson: That's objected to, your Honor. The witness's testimony will speak for itself in the record.

The Court: Sustain the objection.

(Testimony of Allyn R. Hunter.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. I'm asking you if you didn't state this in substance, just before luncheon: "I cannot recall any discussion as to speed". Did you state that, Mr. Hunter? [1057]

A. Not to my knowledge at the present time. If I did, it's in the answers.

Q. I'm asking you if this isn't the substance of just before lunch, now, just before, while you were on this conversation about Macri; question by Mr. Olson on direct examination "Mr. Hunter, does that contain the substance of the conversation between Mr. Macri and in his presence, then, as you recall it, on June 15?" Answer "I think so. There was some discussion as to lumber, and there was a lot of discussion in Mr. Schaefer's behalf on account of the forms drying out, which they were, badly dried out". Now, wasn't that your statement?

A. That was the statement at that time, yes.

Q. Yes, sir, that you made in here just before luncheon. Now, how do you account for the fact that you didn't make this statement that you made after luncheon?

A. Because Mr. Olson asked me.

Q. But when Mr. Olson asked you "Mr. Hunter, does that contain the substance of the conversation between Mr. Macri and in his presence, then, as you recall it, on June 15", the answer you gave is

(Testimony of Allyn R. Hunter.)

the answer. What is your accounting for the fact that you didn't think of something as important as covering the whole compensation basis? [1058]

A. I have no accounting for it.

Q. Sir? A. I have no accounting for it.

Q. You have no accounting for it? All right, sir. You said that while you were there at that time, sir, in substance, according to my notes, that there was practically no lumber that was capable of being used for forms, correct?

A. That's correct.

Q. Now, were you speaking about the job yard at that time? A. That's right.

Q. Were there forms built at that time, there?

A. Yes, sir.

Q. And there was no lumber except in odds and ends, that were not capable of being used for forms?

A. There might have been a few boards.

Q. What kind.

A. I didn't look at the lumber.

Q. Wet or dry? A. I couldn't tell you.

Q. Knotty, or good?

A. I couldn't tell you that?

Q. Planed or rough?

A. I couldn't tell you that.

Q. Two by fours, or shiplap?

A. I don't think that there was much of any lumber there. [1059] There was some odds and ends and scraps, but I didn't pay any attention to—there was no four or five thousand feet there when I was there.

(Testimony of Allyn R. Hunter.)

Q. Now, it is a fact, is it not, that you and Mr. Schaefer and Mr. Waltie came up in your car from Portland?

A. Yes, sir.

Q. To meet Mr. Macri on the job?

A. Yes, sir.

Q. And on that trip you had definitely decided what you were going to talk to Macri about?

A. No, sir.

Q. Sir? A. No, sir.

Q. What was the purpose of the meeting?

A. Mr. Schaefer asked me to come up with him.

Q. Why?

A. To look over and see what I thought about the job.

Q. Why?

Mr. Olson: Your Honor please, that's not a proper question, unless counsel will change his question. My objection is asking Mr. Hunter why Mr. Schaefer did certain things. Obviously he wouldn't know.

Q. That isn't what I mean. What did Mr. Schaefer tell you he wanted you to come for, you, a bond man?

A. He wanted me to look over the job. [1060]

Q. Why?

A. He said he wasn't satisfied with the excavations and the way Macri was running the job.

Q. And you came up there as a cohort and a witness of Schaefer's at that time, did you not?

Mr. Olson: Your Honor please——

(Testimony of Allyn R. Hunter.)

Q. Strike that question. You drove the party here in your car, Mr. Hunter? A. Yes, sir.

Q. Is that your car or the agency's car?

A. That is my car.

Q. Your personal car, yes, sir. And on the way up did you discuss this job?

A. Not to my knowledge.

Q. All right, sir. Did you have any of the layout structure with you?

A. Mr. Fred Waltie had some when we got up there. Whether he got them out of the office or whether he had them with him——

Q. Pardon me; Waltie didn't come up with you?

A. He did come up with us.

Q. He had them when you were on the job?

A. Yes, sir.

Q. Had you had any preliminary conference before you came on that inspection trip, sir? [1061]

A. Not that I remember of, except Mr. Schaefer called me up on the telephone and wanted to know if I could come on the job with him.

Q. Isn't it a fact, Mr. Hunter, that you arranged for this appointment? A. I certainly did not.

Q. Who arranged for it, do you know?

A. Evidently Mr. Schaefer.

Q. You were not present when it was arranged for? A. I was not present.

Q. And isn't it a fact you came up for the purpose of determining how Mr. Schaefer could avoid his sub-contract obligations? A. I did not.

(Testimony of Allyn R. Hunter.)

Q. And isn't it a fact that you knew that there would be yourself, Mr. Schaefer and Mr. Waltie there against Mr. Macri alone? A. I did not.

Q. And you made no memo at all as to lumber?

A. No, sir.

Q. Did you discuss that pile of lumber with Mr. Macri there at the yard?

A. Not to my knowledge.

Q. You, I'm talking about, sir.

A. Not to my knowledge. [1062]

Q. Now, I believe you told counsel that you came back again next time on August 20, 1944?

A. Somewhere in that neighborhood.

Q. That time you came with a Mr. Ratutan, of the City Electric Company, from Pasco up on to this job and then went back to Portland?

A. Yes, sir.

Q. No Mr. Schaefer there at that time?

A. No, sir.

Q. No Mr. Darcy?

A. No, sir, there was none of the men; it was after working hours.

Q. None of the men there at all?

A. I think there was one man there.

Mr. Olson: I didn't get your answer.

A. I think there was one man on the job there, as I remember it.

Q. I think you said there was one man, but at that time that was not a pre-arranged meeting, was it?

A. No, sir; I was up in Pasco on business and drove back that way.

(Testimony of Allyn R. Hunter.)

Q. Now, why did you go to this job at that time? A. Why?

Q. Yes, what was your interest?

A. I think very seldom, after you've spend so much time in [1063] the engineering and constructing business, that if you have been over a job once, you very seldom hesitate, if you don't have to go out of your way, to go over them again.

Q. You drove from Pasco up, didn't you?

A. It was just as easy to go up this side as it was the other.

Q. And you didn't go over the job at all?

A. It was too late in the evening.

Q. But you did go to the yard at that time?

A. That's where the office was.

Q. Isn't it a fact you only went to the yard, between 6 and 7 in the evening, and you didn't make any inspection at all? A. No, sir.

Q. Wasn't that a fact?

A. I didn't make any inspection.

Q. But you did remember at that time, did you not, that at that time there was some Sealtite there?

A. No, sir.

Q. And one thousand or two thousand feet of lumber there in the yard?

A. I estimated there was about one thousand or two thousand feet of lumber.

Q. Did you say something about some Sealtite there? [1064] A. I did not.

Q. Did you say there was some steel ties?

A. I said that there was some steel tied there, re-inforcing steel.

(Testimony of Allyn R. Hunter.)

Q. That was for concrete?

A. Re-inforcing concrete steel.

Q. Yes, sir; and your reason for not going out was that it was too dusty?

A. It was dusty, it was late, and I didn't have anybody to take me out on the job.

Q. Didn't you answer counsel you made no examination of excavations, it was too dusty; isn't that what you said, sir?

A. Yes, sir.

Q. Was there considerable dust out there at that time?

A. Yes, sir.

Q. That would have been a good time to inspect the excavations, would it not, sir?

A. That's right.

Q. But you didn't do it?

A. Didn't have anybody to take me out on the project.

Q. You had your own car?

A. You don't go out on one of those projects without your having somebody go out and show you where they are.

Q. Didn't you know where they were? [1065]

A. Not exactly, no; they cover too much territory.

Q. Then you went on the job the latter part of September or first part of October, correct?

A. Yes, sir.

Q. Your comment then "there was no work going on"?

A. That's right.

Q. No men?

A. No, sir.

(Testimony of Allyn R. Hunter.)

Q. What did you do by way of inspection at that time, sir? A. Nothing.

Q. When you said there was no work going on, or no men, do you mean Schaefer men or Macri men?

A. There was none around the job office; that's as far as I went.

Q. Oh, there was no work going on around the job office? A. No, sir; nobody there.

Q. And you didn't go out in the field at that time? A. No, sir.

Q. And you don't know whether there were any men out in the field or not, do you?

A. I couldn't say.

Q. Mr. Hunter, as an engineer, would you kindly tell me, with due respect to Exhibit 12, which you hold, the approximate weight of the form for a single concrete structure? Take one there; take any batch, any single one, here's [1066] one.

A. Just a minute, I'll have to get my cheaters on here.

Mr. Olson: The approximate weight?

Q. I haven't finished my question yet. All right, referring to structure 10, in lateral 59.3, in Exhibit 12. Can you tell me the approximate weight of that form before it receives the concrete?

A. Of the form itself?

Q. Yes, sir.

Mr. Olson: It's not clear to me. You're asking about forms for a complete structure, or one panel.

(Testimony of Allyn R. Hunter.)

Mr. Holman: I'm just asking for that one, 10, it is a small square one. It's the simplest one I can get.

The Court: What was that section?

Mr. Holman: It is in lateral 59.3, your Honor, the second page of Exhibit 12.

A. Do you mean as dry lumber, wet lumber?

Q. Let's take it dry lumber, and then let's take it wet lumber.

A. Well, there would be about 21 per cent difference in the thing, and I would say off-hand that it weighed somewhere in the neighborhood of 265 to 300 pounds.

Q. 265 to 300 pounds. Now, can you also compute the approximate cubic yardage of concrete that structure number 10 would accommodate?

A. Yes.

Mr. Olson: Your Honor, I fail to see the materiality of this.

The Court: I don't either.

Mr. Olson: How much it weighs with concrete in it; I object to the question on the ground it is wholly immaterial.

Mr. Holman: Well, I'll connect it up, your Honor.

Mr. Olson: How can you possibly connect it up?

Mr. Holman: Well, I'll connect it up on my cross-examination of this witness with respect to his inspection in the field, sir.

(Testimony of Allyn R. Hunter.)

The Court: Well, I'll overrule the objection, but I don't see where it is material, or where it could be material.

A. Do you want this right on the button?

Q. Not right on the button. I want it approximately. You mean by "on the button", exact, do you?

A. Right down to the last hundredth?

Q. No, sir, I do not.

A. Oh, in round figures, it is about 1.57 yards.

The Court: What?

A. 1.57.

Q. And what does a cubic yard of concrete weigh, about, in place? [1068]

A. Well, I can't tell you what your sand content is, out here, or your gravel content.

Q. What would be an average for this job?

A. Average including water?

Q. Yes, in place.

A. Oh, about 4000, close to 4000 pounds, I'd say, average.

Q. Yes, then you said the structure weighed about 300, 250?

A. Yes, somewhere around there; 300.

Q. So that there would be on that structure 10 approximately a 4300 to 4500 pound weight exerted on the earth?

A. Yes, sir.

Q. Now, is it engineering practice to allow for that in fine grading, or not?

A. No, they don't allow for it.

Q. All right, sir. You're sure of that, sir?

(Testimony of Allyn R. Hunter.)

A. There may be some cases where they do, but as a rule, why, they fine grade the stuff right to the hubs, and your compression per cubic inch or square inch takes care of it.

Q. There is no compacting, is there, after the fine grading?

A. I think the Bureau of Reclamation insists on compacting beforehand, don't they?

Q. I say, there is no compacting after fine grading? A. No.

Q. Then you say there is no give for 4500 pounds exerted [1069] within an area such as that structure 10? A. Very little.

Q. All right, sir. Did you determine the weight of any structure, filled, while you made that inspection? A. No, sir.

Q. In your cost of \$26.00 per cubic yard which you gave counsel as the fair and reasonable cost or value under his one hypothetical question, did you include or exclude the cement?

A. Excluded the cement.

Q. And all of the ingredients going into the cement? A. Sand and gravel.

Q. And did you include or exclude transportation? A. Included the whole——

Q. And did you include or exclude demurrage on cars? A. On cars?

Q. Yes, sir. A. Nothing.

Q. You contemplated there would be no demurrage on cars, did you?

A. Couldn't see where there would be.

(Testimony of Allyn R. Hunter.)

Q. And did you include or exclude all items covered by the sub-contract? A. All what?

Q. Items covered by the sub-contract. [1070]

A. All items covered—

Q. Let's put it this way, specified in the sub-contract. A. Specified—included.

Q. Included that, yes, sir. In advance of your inspection in the field had you consulted the books and records of the Schaefer Company?

A. No, sir.

Q. Or any account of any expenditures made by the Schaefer Company? A. No, sir.

Q. Did you at any time prior to that inspection see any account of cost by Schaefer and Company?

A. On that particular job?

Q. Yes. A. No, sir.

Q. And did you in advance of your visit to the job in August—pardon me, in September—August, I should say, August 20, had you consulted their costs? A. No, sir.

Q. Or in advance of your September, late September or first of October visit?

A. No, sir, I have never consulted their costs.

Q. In advance of your taking the stand, Mr. Hunter, have you gone over their costs with them?

A. I have never consulted their costs. [1071]

Q. Then the answer is you have not looked at them at all? A. No, sir.

Q. Can you tell me, please, approximately how much lumber is required per cubic yard of structure, average, for forms?

A. On specific structures?

(Testimony of Allyn R. Hunter.)

Q. No, average; could you tell me that as an engineer? A. Per cubic yard?

Q. Yes, could you do that as an engineer, sir?

Mr. Olson: Your Honor, I think that is immaterial. I suppose he could take these 575 structures and figure them out and divide by 575.

Mr. Holman: I'll withdraw the question in view of counsel's statement, your Honor. I just can't be interrupted in cross-examination.

The Court: Well, counsel has a right to make an objection to your questions, of course, regardless of whether it constitutes an interruption.

Q. How much lumber will it take for an average structure on this 1062?

Mr. Olson: Your Honor please, I object to that as an impossible question to answer. If he wants to refer to any structure, and asks him how much lumber it would take for that structure, I think that is proper, but an average structure, I think it is an impossible question.

The Court: Find out if he can make an estimate, [1072] as an engineer.

Q. I'd like him to say if he can.

A. Yes, I can make an estimate of how much lumber it takes.

Q. Now, did you do that in advance of preparing the bid for Mr. Schaefer, working with him in the preparation of the bid? A. No, sir.

Q. You did not take the cost of lumber into consideration? A. No, sir.

(Testimony of Allyn R. Hunter.)

Q. Did you suggest to Mr. Schaefer that lumber be made a Macri item? A. I did not.

Q. Or any of Mr. Schaefer's men?

A. No, sir.

Q. I understood you to say on direct examination that you happened to go to Mr. Schaefer's office, that he happened to be working on his bid, and you worked with him.

A. I didn't work with him. I roughed out an estimate for my own benefit.

Q. Do you have that estimate with you?

Mr. Olson: I'd like to have the witness finish the last question.

Mr. Holman: Finish the last answer.

Witness: Let's have the question again, please.

(Whereupon, the reporter read the last previous [1073] question and answer.)

Witness: Mr. Schaefer had already had his estimate worked up.

Q. Then you say that you worked an estimate independently of Mr. Schaefer, or you copied his, which?

A. I worked an estimate independently.

Q. Do you have that with you?

A. No, sir.

Q. Can you get that, sir?

A. I have an idea it is in the waste-basket someplace.

Q. What is the rule to determine the lumber required for a structure?

(Testimony of Allyn R. Hunter.)

A. For a structure?

Q. Yes. A. The square footage.

Q. The square footage of the walls?

A. Uh huh.

Q. And the base? A. Uh huh.

Mr. Holman: All right, sir. I have no more questions.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Hunter, you wrote the bond in this case, did you, or Mr. Rogers did?

A. Mr. Rogers; I wasn't in the office much.

Q. And when did you acquire the Rogers Company? A. November 1, 1945.

Q. After this job was completed, I take it, then?

A. Yes, that would be right.

Q. Did you have any interest in that company at the time this job was under way?

A. I was an associate partner.

Q. You were an associate partner?

A. Yes.

Q. So you had a financial interest?

A. I had a financial interest.

Q. You had an interest in the profits of the concern, I take it? A. That's right.

Q. You are general agent for the Glen Falls Indemnity Company? A. Yes, sir.

Q. When you went out on the job June 15, 1944, you were representing the Glen Falls Bonding Company? A. I was not.

(Testimony of Allyn R. Hunter.)

Q. You were not? A. I was not.

Q. Did you make a report to the Glen Falls Bonding Company after you returned to your office?

A. Not at that time, no, sir.

Q. Not at that time; at any subsequent time did you? [1075]

A. I wrote a letter——

Mr. Olson: If your Honor please, I don't think any report this man made—I don't see why they're trying to bring in the Glen Falls Bonding Company. They said they're going to connect it up to show his interest, and as yet they haven't even remotely done so, and I object to any examination on it. It is immaterial.

The Court: I don't quite see the materiality of it.

Mr. Hawkins: If this man made a report to the bonding company directly after this trip, it would tend to show he made the trip on behalf of the bonding company and therefore had an interest in mind, at least, when he went out there.

The Court: Well, I'll overrule the objection. I don't think there is any question but what he represented the bonding company throughout the whole transaction.

Mr. Hawkins: Well, I gathered from what he said that he denied he was representing the bonding company.

The Court: I'll overrule the objection.

Witness: I did not make out any, or did not write any letter in regard to this job for probably

(Testimony of Allyn R. Hunter.)

six or seven or eight months afterwards, and it was in generalities then, to the bonding company, and neither did I represent the bonding company in any way, shape or form on this job, [1076] except I got the commission off of the bond.

Q. Now, when you went out with Mr. Schaefer you went as a friend, I take it? A. Yes, sir.

Q. Who paid for your time while you were out there?

A. I think I took care of my own time.

Q. I didn't understand your answer.

A. I think I paid for my own time.

Q. How do you mean?

A. Why, I bought the gasoline and oil, and probably bought my own meals; maybe Mr. Schaefer did.

Q. You were paid no salary by anyone?

A. No, sir.

Q. Did Mr. Schaefer ever pay for your time out there on that job? A. No, sir.

Q. Did you go out there as his consulting engineer? A. No, sir.

Q. Then when you went out there you were not compensated by Mr. Schaefer or the bonding company in any way, shape or form?

A. I was not.

Q. Except as you received a commission from the bonding company for the sale of the bond?

A. That's right. [1077]

Q. You testified that \$26.00 or \$27.00 per cubic yard is the fair price or value of concrete poured out there, is that right? A. Yes, sir.

(Testimony of Allyn R. Hunter.)

Q. Did you know that Mr. Macri contracted to pour that concrete for \$35.00 a yard?

A. I did.

Q. How did you arrive at \$26.00 a yard as being the fair value?

A. Equipment rentals, labor——

Q. Equipment rentals; was there any equipment rented on this job?

A. Practically all contractors charge a rental.

Mr. Hawkins: Now, I object to that and move that that answer be stricken as not responsive.

A. I don't know whether there was equipment rentals on the job or not. In making up my bid I would have to figure equipment rentals.

Q. And what equipment did you have in mind, sir?

A. A mixomobile.

Q. And what else?

A. And from two to four trucks.

Q. And what else?

A. One of those would be used as a water wagon, and incidental tools. [1078]

Q. Any other equipment?

A. Not at that time.

Q. Did you figure on a buggymobile?

A. No.

Q. What about labor costs? What was the scale of a carpenter at that time?

A. Oh, let's see, I think the scale of a carpenter at that time was somewhere around \$1.47½, something like that.

(Testimony of Allyn R. Hunter.)

Q. You don't remember?

A. Not exactly.

Q. And what was the scale paid a concrete operator?

A. A concrete operator on a Mixomobile, I think it is \$1.75.

Q. At that time?

A. Yes, somewhere around there.

Q. You don't remember?

A. No; we had work going ourselves, and followed the scale explicitly at that time.

Q. And who is "we"? You mean the bonding company?

A. No, C. H. Wheeler Construction.

Q. Were you associated with Mr Schaefer in any way as a partner on this job? A. No, sir.

Q. Did you have any financial interest on it at all? A. No, sir.

Q. You were pretty busy in those days, weren't you, sir? [1079]

A. Very busy.

Q. Working for the Wheeler Company?

A. Yes, sir.

Q. Have you since become a partner of Mr. Schaefer's? A. No, sir.

Q. Or financially interested in any of his jobs?

A. No, sir.

Q. Do you know whether or not the Glen Falls Bonding Company financed the completion of Mr. Schaefer's contract?

A. I know definitely that the Glen Falls did not furnish any money on this contract.

(Testimony of Allyn R. Hunter.)

Q. On this contract?

A. Or any other contract of Mr. Schaefer.

Q. You testified on direct examination that if Mr. Macri had performed his work according to his contract, that Mr. Schaefer would have been able to complete his work in 70 or 75 working days, is that right? A. Yes, sir.

Q. Now, what sort of crew did you have in mind when you so testified?

A. I would say around, somewhere between 17 to 25 men, owing to what the conditions were.

Q. 17 to 25 men. Now, you know as a matter of fact that Mr. Darcy was never able to get that many men on the job at any time, don't you? [1080]

A. I do not know.

Q. Well, if, as a matter of fact, Mr. Darcy were only able to get on the job from 6 to 10 men, and a maximum of 12 at any time, would that change your estimate as to the number of days that he could have completed that contract in?

A. To a certain degree, without additional equipment put on to take care of the men.

Q. It would have taken twice as long, would it not? A. No, not twice as long.

Q. It would not have taken twice as long?

A. No.

Q. No, then, you say more equipment to take care of the additional men, I think you testified a moment ago you contemplated one Mixomobile and four trucks on the job?

A. I did at that time.

(Testimony of Allyn R. Hunter.)

Q. Yes; now, if you have one Mixomobile and two to four trucks on the job, and the men on the job were busy all the time, do you contend he could have done the job in less time if he had 25 men on the job?

Mr. Olson: I object to the question as being complex. It is argumentative, contains elements not involved in this case; the evidence is the equipment was not busy all the time, that they worked from one to three days a week and would be off for five days; that's all [1081] the testimony.

The Court: I'll sustain the objection.

Mr. Hawkins: Your Honor, my point here is simply this, that this witness has said it would take 70 to 75 days to complete this job if Macri had performed according to contract. Now we find out that his estimate is based on the assumption that there would be 20 to 25 men on the job all the time, and these records, while they haven't been admitted in evidence, are here. They show that at no time did Schaefer and Company have any more than 12 men on the job at any one time, and I submit that this witness's testimony of 70 to 75 days is not based on the facts of this case at all.

The Court: Did he say he assumed there would be 25 men on the job?

Mr. Hawkins: 20 to 25, is that not right, sir?

Witness: 17 to 25.

Mr. Olson: Your Honor, that is the very point we're making. Counsel ought to be over here. That

(Testimony of Allyn R. Hunter.)

is our contention, that they didn't have the holes through to put on that big a crew.

The Court: Well, let's start over again.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Now, then, Mr. Hunter, if in fact, instead of 17 to 25 men, you had on the job only 6 to 12 men, would it not [1082] have taken twice as long as your 70 days to complete this job?

A. Not in proportion to your figures, no, if you strike a figure of 6 to 12——

Q. First, would it have taken longer?

A. It would have taken longer.

Q. Yes. All right, how much longer?

A. It is owing to what proportion of men. If you're going to use 6 men, that's one thing; if you're going to use 12 men, that's a different thing.

Q. Well, you used 25 in your estimate, didn't you?

A. No, I said from 17 to 25.

Q. Well, 25 is one of the figures you mentioned.

A. All right, we'll take 17 men.

Q. No, let's take 25 men. You're the one that mentioned that figure, as opposed to 10. How much longer would it take 10 men to do the job than 25?

A. Oh, you wouldn't go quite twice as much.

O. Not quite twice as much?

A. No, because your equipment there, if it is rolling, if you've got enough men for your equipment rolling, and you put your forms in——

(Testimony of Allyn R. Hunter.)

Q. In other words——

Mr. Olson: Let him finish.

A. ——if you can take that concrete mixer and keep going——[1083]

Mr. Hawkins: Well, he's not answering any question I asked.

The Court: Let's not argue. Address your remarks to the Court.

Mr. Hawkins: I would like to ask another question.

The Court: All right, if you will wait until the witness answers the question. Did you finish your answer?

Witness: Well, no. If you take a certain crew of men and double that crew, you're not going to expedite it 100 per cent, or if you cut off half of that crew you might not drop the efficiency of the crew 100 per cent, or 50 per cent. It is owing to whether your equipment is moving all the time and you have forms for your concrete to go into.

Mr. Hawkins: I wonder if the reporter would read my last question, please?

(Whereupon, the reporter read the last previous question [the question commencing at line 15, page 430 of this transcript].)

Mr. Hawkins: I submit that answer is not responsive to my question.

The Court: Well, go ahead and ask another question.

(Testimony of Allyn R. Hunter.)

Mr. Hawkins: I take it your Honor is denying my motion to strike that as not being responsive.

The Court: Yes, it is denied.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Hunter, you testified that it cost or would cost two or three times the actual cost—strike that—you testified that Mr. Schaefer's actual costs were two or three times what they would have been had Mr. Macri properly performed his contract, is that right?

Mr. Olson: Your Honor, that's not correct. He didn't state what Mr. Schaefer's costs were, nor did I ask him. I asked him what the costs would be.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

The Court: I'll overrule the objection. He can tell what he said.

Witness: I'm sure that I didn't testify as to Mr. Schaefer's costs.

Q. Well, Mr. Hunter, did you not testify on direct examination that Mr. Schaefer's costs were two or three times, actually, what they would have been had Mr. Macri performed his contract? I realize you do not know and did not testify as to what Mr. Schaefer's costs were, but you did testify

(Testimony of Allyn R. Hunter.)

that they were two or three times what they would have been had Mr. Macri performed his contract?

A. That's what I think.

Q. Isn't that what you testified on direct examination?

A. I testified that the costs would run approximately two or three times additional on the time element alone.

Q. Now, that testimony was based upon your going out in the field and being out there for a period of about four hours, is that right?

A. Not necessarily, no.

Q. Now, I'm asking whether it is necessary or not.

A. No, it wasn't based upon that.

Q. It was not based upon what you saw out there in the field at all?

A. It was based partially on what I saw in the field.

Q. And you saw only 7 or 8 structures, or 6 or 8 structures, when you were out in the field?

A. Yes.

Q. Out of a total of some 500 structures?

A. That's all that were in.

Mr. Hawkins: Your Honor, at this time I move that this witness's answer to those hypothetical questions be stricken because he now admits his answer was based partly upon what he saw in the field, and not strictly upon the elements counsel enumerated in his hypothetical question.

The Court: Denied. [1086]

(Testimony of Allyn R. Hunter.)

Mr. Hawkins: Well, your Honor, this witness has just now stated that his answer to that question——

The Court: Was partly based upon his looking at the structures in the field.

Mr. Hawkins: Your Honor, as I understand it, in answering that question he was directed to certain elements that counsel enumerated in his hypothetical question.

The Court: Well, it goes to the weight of the testimony, not the admissibility. I'll deny the motion to strike.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. What did you base that testimony on, sir?

A. What I saw in the field;

Q. What else?

A. On the man hours that was told to me.

Q. By whom?

A. By Mr. Schaefer and Mr. Hendershott.

Q. As to what? A. What——

Q. As to what? Number of man hours?

A. Number of man hours that was worked on the job.

Q. What else?

A. And common ordinary common sense construction practice.

Q. Was it based at all upon your experience as an engineer? A. It was. [1087]

(Testimony of Allyn R. Hunter.)

Q. It was based upon your experience as an engineer, upon common everyday horse sense, upon what Mr. Schaefer told you was the number of man hours spent, and upon your experience in the field, is that right? A. Yes, sir.

Q. Anything else?

A. I don't remember offhand just now.

Mr. Hawkins: Your Honor, I renew my motion. The witness's answer to those hypothetical questions is based now partly upon what Mr. Schaefer told him.

The Court: Motion denied.

Cross-Examination
(Continued)

By Mr. Hawkins:

Q. Mr. Hunter, how much does concrete weigh per cubic yard? A. It varies.

Q. From what to what?

A. Oh, it could weigh—it is owing to what your aggregates weigh, how much water you're using.

Q. Did you see any of the aggregates used in the field? A. Yes.

Q. Assuming that that is the aggregate that I'm asking about.

A. You cannot judge aggregates by looking at them.

Q. I see. Then you have no idea as to what the concrete would weigh, wet, poured into the form?

A. In round figures, yes.

(Testimony of Allyn R. Hunter.)

Q. What is that? [1088]

A. Somewhere around two ton.

Q. Around two tons per cubic yard; do you have any idea as to the lateral pressure exerted by that wet concrete?

A. Oh, I couldn't give you the square inch pressure.

Q. You could not? A. No.

Q. Do you have any idea as to what the vertical pressure of that concrete, wet, poured into the forms? A. No.

Q. Per square inch? A. No.

Q. Do you have any idea as to the type of foundation soil there must be to sustain that kind of weight?

A. That is problematical, and a technical question as far as compaction is concerned, and type of soil.

Q. You qualified yourself as an engineer here, sir. A. Yes, sir.

Q. And a man of much experience in concrete work, isn't that right? A. Yes, sir.

Q. And you do not know the vertical pressure exerted by wet concrete? A. I do not.

Mr. Olson: If your Honor please, to this line of questioning I wish to place this objection, that the [1089] testimony shows by the Bureau of Reclamation engineer called by the defendants that these structures were all tested and checked by the Bureau of Reclamation field inspectors for grade, and OK'd for the pouring of concrete. Our testi-

(Testimony of Allyn R. Hunter.)

mony is to the excavation work in order to put in the structure forms to that grade, and the question of lateral pressure or allowance for being higher or not is certainly immaterial, because every one of these forms was checked by the Bureau of Reclamation and approved by them, and had to be, before we could pour concrete.

The Court: I assume what they're trying to show is that it is all right to leave them high because the concrete would press them down to grade. I'll overrule the objection.

Mr. Hawkins: My purpose is directed to this witness's qualifications, your Honor. Here is an engineer who has had years of experience in pouring concrete for years and years and years, 17, if I'm not incorrect, and he doesn't know the lateral or the vertical pressure exerted by concrete. I submit that goes to this man's qualifications, and that his testimony becomes entirely weightless if he doesn't know a simple matter of that kind.

The Court: I don't think engineers know everything, any more than lawyers do. I'll overrule the [1090] objection.

Witness: I doubt if there is any man in the Bureau of Reclamation, without they're really working with that, that can tell you that.

Mr. Hawkins: Just a moment. I move that be stricken as not responsive.

The Court: It will be stricken.

(Testimony of Allyn R. Hunter.)

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Hunter, have you examined Exhibits 23, 24, 25 and 26? A. Yes, sir.

Q. In reference to Exhibit 23, that is the ideal excavation, is it not? That's a perfect excavation?

A. I wouldn't say that.

The Court: You'll have to speak up so that we can hear.

A. It is very good.

Q. That is a very good excavation? And it would form a proper basis for pouring concrete?

A. I should think so, yes.

Q. Well, you've examined it. Don't say whether you think so or not. A. I do; it is.

Mr. Holman: Pardon me, I didn't get the answer.

A. I said it is, and I do.

Mr. Hawkins: I wonder if the reporter would mark [1091] a particular bank here for us?

The Court: Do you want the clerk to mark it for you? The reporter can't write and mark at the same time.

Mr. Hawkins: The clerk. Mr. Clerk, would you please mark that bank right there?

(Whereupon, a portion of Exhibit 23 was marked Exhibit 23a)

(Testimony of Allyn R. Hunter.)

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Now, with reference to bank 23a, Mr. Hunter, I'll call your attention to the fact that that is a vertical which starts at the footing and goes directly down. A. Yes, sir.

Q. And on the top of that bank there is a concrete pour? A. Yes, sir.

Q. Now, in your opinion is that a proper excavation for that concrete pour?

A. It is owing to whether it is to be performed or not——

Q. Just a moment. Can you answer that question yes or no, sir?

A. No, I can't answer it yes or no.

Q. You cannot answer it yes or no. Now, is it not a fact that this wet concrete pressing down on that vertical excavation would cause it to crumble and fall?

A. Before I answer that may I ask a question?

Q. No, you may not, sir. Can you answer my question? [1092]

A. Let me see the form just a minute.

Q. Can you answer my question, sir?

A. Yes.

Q. What is your answer?

A. It would not cave in on the form, with a form in there.

(Testimony of Allyn R. Hunter.)

Q. Beg pardon?

A. It would not cave in with a form in there. Do you mean they're going to lay the slab first, before they put the forms in?

Q. Just a moment, Mr. Hunter. With reference to plaintiff's Exhibit 23 and plaintiff's Exhibit 24, if you have the concrete forms built according to Exhibit 24, and then pour your concrete into it, this wet, heavy concrete, will it not as a matter of fact break down bank 23a?

A. Yes, probably on that corner.

Q. Yes. In other words, plaintiff's Exhibit 23 is not a proper excavation for that structure, is that not right, sir?

A. I think the excavation is all right.

Q. Even though the bank would break down when the concrete was poured?

A. It would require a form in there to hold that bank.

Q. Yes, and there is no form there, is there, sir?

A. No.

Q. Having in mind that structure, it is not a proper excavation? [1093]

A. I think it is a proper excavation.

Q. Provided there is another form in there?

A. It still would have to be a proper excavation, otherwise I don't know how it would be done.

Q. Would you as an expert concrete engineer, Mr. Hunter, state that it was proper to pour wet

(Testimony of Allyn R. Hunter.)

concrete on to a foundation that consists of a vertical bank falling away below the footing of the concrete?

A. Would you state that question again?

(Whereupon, the reporter read the last previous question.)

A. No, not necessarily.

Q. Now, Mr. Hunter, on direct examination you testified that these excavations that you saw out there were not proper in order to receive the structures? A. That's right.

Q. Now, what did you have in mind when you said "proper"? A. They were too tight.

Q. You had in mind the experience that you had on other jobs? A. That's right.

Q. In other words, your testimony in that respect was based upon experience that you had had in other concrete construction jobs?

A. That's correct. [1094]

Q. And other excavations on other jobs, including this reclamation project down in Oregon, is that right, sir?

A. I didn't have that reclamation project in Oregon; I bid on four jobs down there.

Q. You bid on them? A. Yes.

Q. I see; you didn't get them? A. No.

Q. Mr. Hunter, in all of your experience in concrete work have you ever seen an excavation like Exhibit 23 in reclamation work?

A. Probably not that neat, no.

(Testimony of Allyn R. Hunter.)

Q. You consider Exhibit 23 typical of the type of excavation required by the specifications 1062?

A. To a certain extent, yes.

Q. What do you mean by "to a certain extent"?

A. Well, I think that's what they would strive for.

Q. That's something you strive for but you never can attain, isn't that the truth?

A. Well, it can be attained to——

Q. Is it ever attained in practical construction, sir?

A. Where a contractor's doing his own work, he most generally——

Q. Just a moment——

A. Is it ever attained?

Mr. Hawkins: Would you repeat that question again? [1095]

(Whereupon, the reporter read the last previous question, as follows: "Is it ever attained in practical construction, sir?".)

A. Yes, it is attained.

Q. Now, I understood your testimony a few minutes ago that you had never seen one like Exhibit 23?

Mr. Olson: No, he said, your Honor, he had never seen one that neat.

The Court: Well, proceed.

Q. Well, which is right? Exhibit 23 is typical of construction generally?

A. I didn't say it was typical; I said that you will see some of it that good, but very little.

(Testimony of Allyn R. Hunter.)

Q. Very little, yes. Now, you say you examined the specifications on this job 1062?

A. I did.

Q. And what would say the specifications called for in the way of a slope?

A. I couldn't tell you right now. I haven't examined them since 1944.

Q. I see. Well, now, you just testified that Exhibit 23 was a typical one required.

A. I've heard enough on it that I think it is one foot out and a 1 to 1 slope.

Q. One foot out from what? [1096]

A. One foot out from the outside of the form.

Q. From the outside of the form?

A. From the form out, and then on a 1 to 1 slope.

Q. And your testimony is based on that assumption?

A. Yes.

Q. Well, now, I don't want to seem burdensome, Mr. Hunter. I have specifications 1062, plaintiff's Exhibit 3, this is the exhibit itself. I wonder if paragraph 47 is not the paragraph you examined when you made that determination?

A. Yes, sir.

Q. That's the paragraph on which you based your assumption that it called for a foot from the outside of the forms?

A. Outside of the footing.

Q. Well, now, just a moment. Would the reporter read the question? I'm sure Mr. Hunter said from the form.

(Testimony of Allyn R. Hunter.)

(Whereupon, the reporter read the previous questions and answers, as follows: "Question: I see. Well, now, you just testified that Exhibit 23 was a typical one required." "Answer: I've heard enough on it that I think it is one foot out and a 1 to 1 slope." "Question: One foot out from what?" "Answer: One foot out from the outside of the form." "Question: From the outside of the form?" "Answer: From the form out, and then on a 1 to 1 slope.")

Q. I think that was established pretty clearly, Mr. Hunter, that your testimony was based on a measurement of one foot from the outside of the form out, and then on a 1 to 1 slope. A. Yes.

Mr. Olson: Move that be stricken. It doesn't constitute a question, it constitutes a statement of counsel.

The Court: Overruled.

Mr. Holman: May it please the Court, the witness said "yes."

The Court: Yes, he said that was his testimony.

Cross-Examination
(Continued)

By Mr. Hawkins:

Q. Now, is it not a fact that the dimensions as given by the specifications are one foot outside of the foundation of the structure?

A. That's right.

(Testimony of Allyn R. Hunter.)

Q. And not one foot from the outside of the form? A. That's right.

Q. And that of course is for pay quantity, is it not, sir? A. That's right.

Q. Now, do you ordinarily in determining the specifications, Mr. Hunter, take the pay quantity measurements?

A. How do you mean the question there?

Q. The question is this, Mr. Hunter: In determining what [1098] the specifications call for in the way of an excavation, do you take the pay quantity set forth in the specifications?

A. You take that as the specification to do the job by.

Q. You take that as the specification of the excavation itself, sir? A. Yes.

Q. That, however, is in fact the measurement for payment, is it not, sir?

A. The one foot out and the 1 to 1 slope?

Q. Yes. A. Yes, sir.

Mr. Hawkins: I think that's all.

Mr. Holman: May I ask an additional question?

The Court: I think hereafter, it seems to me that it is fair to let each counsel cross-examine once, and not come back again and again on the same witness before there is redirect examination; if you have another question here——

Mr. Holman: I just had in mind, Mr. Hawkins developed something on 23a that I didn't touch on in my cross-examination, your Honor.

The Court: All right, I'll permit you to ask it.

(Testimony of Allyn R. Hunter.)

Cross-Examination

By Mr. Holman:

Q. You stated, did you not, that you estimated jobs similar [1099] to the Roza Project?

A. Yes, sir.

Q. Now, have you ever in the field, as a practical construction matter, seen excavations for structures similar to 23? A. Yes, I have.

Q. On the Roza Project, sir? A. No, sir.

Q. You have not seen it on the Roza Project?

A. No, sir.

Mr. Holman: That's all, sir.

Redirect Examination

By Mr. Olson:

Q. Mr. Hunter, counsel asked you if you were out on the job June 15, I believe, if you checked any excavations that did not have forms in them, upon which the fine grading had been done, and you said "no." Do I correctly narrate your testimony? What I want to get at is, why didn't you, Mr. Hunter? A. Why didn't I?

Q. Yes.

A. I wasn't going checking anything except as Mr. Schaefer and Mr. Maceri were discussing the thing there, and for my own benefit I just looked at the holes and pulled out my rule that I took out of the car with me and measured between the hubs, and satisfied my own curiosity, and [1100] then talked it over with both of them.

Q. Did you find any holes there at that time that had been fine graded or upon which fine grading

(Testimony of Allyn R. Hunter.)

had been done, that didn't have structure forms in them?

A. No, there was no holes that was fine graded at the time I was there.

Mr. Olson: That's all.

Mr. Holman: You mean there were no holes that you inspected? A. That is correct.

The Court: Any further questions?

Mr. Olson: Could Mr. Hunter be excused? He is very anxious to get back to Portland.

Mr. Holman: Your Honor, I would like to have Mr. Hunter available as a defense witness with respect to the application to the Glen Falls Indemnity Company. I don't want him to wait here, but I would like to have him subject to returning at our expense.

The Court: Where is your office?

Witness: Title and Trust Building, Portland.

The Court: Will you be there?

Witness: I certainly will.

The Court: Then you will be available for subpoena?

Mr. Holman: I can't subpoena, your Honor, over [1101] 100 miles.

Mr. Olson: Do you have in mind having him produce a record that is in his possession?

Mr. Holman: I have in mind having this witness testify as to the application, and I think I can prove he saw it.

Witness: Your Honor, if I can write for that application, I would be more than willing to get it. I can't demand the Glen Falls to give it to me.

(Testimony of Allyn R. Hunter.)

Mr. Holman: Well, I will be satisfied if you will send me a photostat of the application signed by Mr. Schaefer, sir, and certified by you that it is a correct copy.

Witness: Well, all I can do is write to the Glen Falls and request it.

Mr. Holman: No, you may telephone at my expense, sir, and I will pay that, and I will pay the air mail back. Will you do that, sir?

Witness: I will.

The Court: Well, subject to the qualification, Mr. Hunter may be excused.

Mr. Holman: But may he be called back, your Honor, when he's needed with respect to that?

The Court: Well, I assume so, yes. You would come back here if you were called by the defense?

Witness: Yes.

Mr. Holman: I don't want to be captious about it at all, but if I have what I think I have, I want this witness on the stand.

Witness: I would be glad to furnish that, and come back.

Mr. Olson: I just want him released as far as I'm concerned.

The Court: Yes, you're entitled to that.

(Whereupon, there being no further questions, the witness was excused.)

(Whereupon, the Court took a recess in this cause until Wednesday, March 5, 1947, at 9:30 o'clock a.m.)

Yakima, Washington, Wednesday, March 5, 1947

9:30 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

EDWARD C. KEELER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Edward C. Keeler.

Q. Where do you live, Mr. Keeler?

A. Route 1, Yakima.

Q. And what is your occupation?

A. Engineer with the Bureau of Reclamation, Roza Project.

Q. What capacity do you hold? What is your official position with the Bureau of Reclamation?

A. Office engineer.

(Whereupon, final estimate for payment on specification 1062 was marked Plaintiff's Exhibit No. 61 for identification.) [1104]

Q. Showing you, Mr. Keeler, plaintiff's identification 61, I'll ask you what that document is?

A. That the final estimate for specifications 1062-1.

Q. 1062? A. Yes.

Q. And schedule——? A. 1.

(Testimony of Edward C. Keeler.)

Q. Now, does that document, is that one of the official documents of the Bureau of Reclamation records? A. Yes, sir.

Q. Now, does that document, is that one of the official documents of the Bureau of Reclamation records? A. Yes, sir.

Q. Now, does that show in the case of each item of specification 1062, schedule 1, the final estimated for pay quantities and also the final amounts paid in each case, to Macri Company? A. Yes.

Mr. Holman: And deductions, it shown deductions too?

Q. Well——

Mr. Holman: All right, I'll cross. I was trying to save time.

Q. I have no objection; do you mean that deduction for the former payment?

Mr. Holman: No; penalties.

Q. Well, maybe it does. Does it show a penalty deduction?

A. Previous deductions; deductions this month, which may be [1105] for materials wasted, or running overtime on the contract. I don't know what these particular deductions are for here; you'll have to refer to the records.

Mr. Olson: Then, your Honor, I offer in evidence the first page of plaintiff's identification 61 and all of the second page down to and including the gross amount earned.

Mr. Holman: I object to that, your Honor. This is an official document of the government, and they

(Testimony of Edward C. Keeler.)

can't take parts of it and offer it in evidence. In other words, there is a final estimate there, a complete estimate by the government, of Macri's work, and I submit if it is going to be offered, it has to be offered.

The Court: May I see it.

Mr. Olson: The part that I'm offering I believe shows the complete Macri bid, the complete pay quantities, and the complete amount earned and paid. Now, the other information there relates to previous part payments, which I'm not interested in.

The Court: Any other objection to this, other than it isn't complete?

Mr. Holman: Yes, your Honor. I object to the introduction of it as part of plaintiff's case as immaterial, and irrelevant, and outside of the issues as between the plaintiff and the defendant Macri for the [1106] reason that their first cause of action is based upon the sub-contract, and the second cause of action is based upon alleged breach. Now, if it is upon alleged breach that he's offering this, it is wholly immaterial. It is a question then not of paid amounts but of reasonable amounts, and if it is on the first cause of action, I've already lodged the objection which shows that there is no basis for the claim as against any of Macri's earnings as such, and I would like to add to that this, that contrary to the provisions of the sub-contract, there has not been shown in this case any compliance with the

(Testimony of Edward C. Keeler.)

terms thereof with respect to furnishing Macri in advance a schedule of work to be performed by the sub-contractor.

Mr. Hawkins: I also object to the introduction of this exhibit 61. I don't believe it has been properly identified yet. Apparently it purports to show the amount of money paid to Mr. Macri, and purports to be some record from the office of the Bureau of Reclamation. Now, I don't think it is competent evidence to show the amounts paid. I don't think it is material in any event. I can't see how it is part of plaintiff's case, or material, or within the issues, to show what Mr. Macri was paid for his work. It has no bearing on the issues in this case at all, and I repeat, I don't think it's been properly identified. [1107]

Mr. Holman: I will state I had this witness subpoenaed as part of our case, subject to call, at which time I proposed to have him identify all of the estimates, including the final estimate which is a summation estimate, and at that time, as part of our case, I will have them introduced in evidence.

The Court: Your objection, then, is to the order of proof?

Mr. Holman: No, my objection is as I stated, so far as the plaintiff's case, it is immaterial. It is a summation, your Honor, which shows their final estimate, and it can only be based upon the prior story of the other estimates plus the computations in the office. I would like to ask this witness one question.

(Testimony of Edward C. Keeler.)

The Court: Go ahead.

Mr. Holman: Do you yourself make up those estimates? A. No.

Mr. Holman: Or is it Mr. Anderson?

A. Mr. Anderson.

The Court: What is your position in the Reclamation office?

A. Office engineer.

The Court: Are these records under your supervision, part of your office records? [1108]

A. Yes.

The Court: Objection will be overruled. Admitted.

(Whereupon, Plaintiff's Exhibit No. 61 for identification was admitted in evidence.

(Whereupon, Final estimate for payment on specification 1068 was marked Plaintiff's Exhibit No. 62 for identification.)

Mr. Olson: I take it that the agreement that we had before of the right to substitute copies at my expense goes?

The Court: Yes, you may substitute copies.

Mr. Holman: Your Honor, may the same objections go to each one of these estimates?

The Court: Yes, if you wish, the record can show the same objection is made to each of them.

(Testimony of Edward C. Keeler.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Handing you plaintiff's identification 62, Mr. Keeler, will you state what that is?

A. That's the final estimate for specification number 1068.

Q. Does that show the same information with reference to specifications 1068 as the previous plaintiff's exhibit, 61, shows with reference to 1062?

A. Yes, it does.

Q. And is this likewise one of the records of the Bureau of Reclamation made in the office over which you have supervision [1109] and charge?

A. It is.

Mr. Olson: We offer in evidence plaintiff's identification 62.

Mr. Holman: Well, we've already made our record, Mr. Olson.

Mr. Hawkins: We make the same objection, your Honor.

The Court: Yes, the record will show the same objection. I'm not clear as to the materiality of this offer, Mr. Olson. You didn't finish 1068.

Mr. Olson: We never even started it, your Honor, but we have a cause of action.

The Court: Loss of profits?

Mr. Olson: Yes, and it is necessary for us to show the number of cubic yards, I believe, of concrete work that there was in 1068, and this is our method of showing that.

(Testimony of Edward C. Keeler.)

The Court: That isn't shown in the specifications, particularly?

Mr. Olson: Just estimated, your Honor, and this is the actual amount that was in that job. That's the sole purpose I'm offering it for.

The Court: It will be admitted. I might say—you're offering only part of this? [1110]

Mr. Olson: Well, I'll offer all of that.

Mr. Holman: Did your Honor admit only part of the other one?

The Court: I think counsel has a right to offer parts, where they're divisible parts, as part of his case. However, I might say that in order to avoid splitting these documents, if you wish to make an offer of the balance, I don't think it should be split up.

Mr. Hawkins: Your Honor, of course we object to that also.

The Court: Yes, your objection goes to the whole thing.

Mr. Holman: Without prejudice to any motion we might wish to make at the close of plaintiff's case, I would respectfully suggest that the whole of 61 be admitted.

The Court: Have you any objection to that, Mr. Olson?

Mr. Olson: No, not if he's going to offer it.

Mr. Holman: I've already told your Honor that I am going to offer all these estimates.

The Court: I think the whole thing should go in. For the sake of orderly procedure here, I'll just

(Testimony of Edward C. Keeler.)

let the whole of identification 61 in, and then you offered all of 62, didn't you? [1111]

Mr. Olson: Yes.

(Whereupon, plaintiff's Exhibit No. 62 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Keeler, did your office figure the final quantities of excavation paid Mr. Macri under 1062?

A. Yes, we did.

Q. And calling your attention to specifications 1062, and particularly that part thereof which says that except for the limitations described above, excavation for structures will in general be measured for payment to lateral dimensions of one foot outside of the neat line and to slopes of one to one, for common excavation, I'll ask you whether or not that provision of the specifications 1062 with reference to lateral dimensions of one foot outside the foundations of the structures, and slopes of one to one for common excavation, was applied to each and every one of the structure excavations made by Macri and Company on 1062, and if he was paid for excavation on each of those structure excavations to those dimensions?

Mr. Holman: Just a minute. Your Honor, I object, for the reason that the witness has already shown he did not make the computations, and there-

(Testimony of Edward C. Keeler.)

fore as far as this witness is concerned, it would be based upon hearsay information or office information; also for the reason [1112] this witness has already shown he is not the one in charge of the work, but merely in charge of the office, therefore he's not the one that makes the computation.

The Court: Did he testify payment was made through his office?

Mr. Olson: He's the one in charge of the office, and his office is the one that figured this job for payment.

Mr. Holman: I have this in mind in connection with my objection; as your Honor knows, I had Mr. H. T. Nelson arrange to be here to testify as part of our case. I received a communication from his superior showing it can't be done. I've served counsel with notice that I'm taking the deposition of the engineer in charge, Mr. Nelson, and therefore this witness is not the one who had charge of this work. That's correct, is it not, Mr. Keeler, you didn't have charge of this work?

Witness: The work on the project was under Mr. Nelson. The work in the office was under my supervision but his orders.

Mr. Holman: That's my position, your Honor.

The Court: Perhaps you had better develop more in detail how payment was made. Mr. Nelson isn't available as a witness.

Mr. Holman: I've served notice on counsel that I'm [1113] taking the deposition of Mr. Nelson at Boise, if your Honor will let it in.

(Testimony of Edward C. Keeler.)

The Court: Well, that wouldn't help counsel, unless he took a deposition. It is your proof.

Mr. Holman: My position is that Mr. Harold Pease, who has charge of the office and submitted them to the Court, is the officer in charge. This gentleman is the office engineer, and it is much the same, your Honor, as asking the Clerk of this Court or the reporter to speak for your Honor in connection with the Court: It is not the proper witness.

The Court: Well, I think if he had charge of certain work under my direction, and did it, you don't have to certify a copy of my files through me, but you can through the Clerk.

Mr. Holman: That's correct, sir, but he, the witness, has already testified he did not make the computations. They were made by Mr. Anderson.

The Court: Well, they were made under his direction. You can go ahead and develop it.

Direct Examination

(Continued)

By Mr. Olson:

Q. The final figures for payment, Mr. Keeler, were those made in the office over which you have supervision and charge? A. Yes. [1114]

Q. And were they made pursuant to your supervision and direction? A. Yes.

Q. And do you know how the computation was made for payment, as to excavation quantities.

A. Yes, I do.

The Court: I'll overrule the objection. He may answer.

(Testimony of Edward C. Keeler.)

(Whereupon, the reporter read a portion of the question objected to, as follows: "I'll ask you whether or not that provision of the specifications 1062 with reference to lateral dimensions of one foot outside the foundation of the structures, and slopes of one to one for common excavation, was applied to each and every one of the structure excavations made by Macri and Company on 1062, and if he was paid for excavation on each of those structure excavations to those dimensions?")

Mr. Holman: I would like to add to the objection that the question is immaterial and irrelevant, and outside the issues as framed by the pleadings in this case.

The Court: Overruled.

Witness: The yardage paid on each structure excavation was equal to lateral dimensions of one foot outside and one to one slopes.

Mr. Olson: Now, that completes my direct examination [1115] of this witness, your Honor. I'm just going to make this statement, that I assured this witness, and with permission of counsel, and of course subject to your Honor's permission, that if we didn't get through with the cross-examination by five minutes to 10, he's got some bids, apparently, to open back there; I don't know whether counsel can finish in five minutes or not.

Mr. Holman: I agreed with you that I would, sir.

(Testimony of Edward C. Keeler.)

Cross-Examination

By Mr. Holman:

Q. Mr. Keeler, that is what is known as the neat line payment; payment to the neat line?

A. No, neat line payment is made to the outside of the concrete section.

Q. That's for the concrete? A. Yes.

Q. But as to excavation—do you know?

A. I don't quite understand the question.

Q. Is that one foot out a field measurement, or is it a computation measurement in the office?

A. It is a computation measurement.

Mr. Holman: Yes. That's all.

The Court: Mr. Hawkins?

Cross-Examination

By Mr. Hawkins:

Q. Mr. Keeler, if the slope had been dug two to one, what would have been the payment? [1116]

A. Pardon?

Q. If the slope had been dug on a two to one slope, instead of what it was, what would have been the payment? A. Same payment.

Q. In other words, you would have the same payment regardless of the type of excavation actually performed on the job?

A. That's right, in this particular specification.

Q. Yes. In other words, you followed the language of the specification? Would you say yes,

(Testimony of Edward C. Keeler.)

rather than nod your head, so it will be in the record? A. Yes.

The Court: Any further questions of this witness?

Further Cross-Examination

By Mr. Holman:

Q. Well, two to one or any other grade or slope would still be paid only one to one, wouldn't it?

A. That's right.

The Court: If there are no further questions, you may be excused, Mr. Keeler.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Holman: May it please the Court, I was given the opportunity last evening to go over with Mr. James A. Black, the witness that we had subpoenaed and whom counsel called, and I find this arrangement, this difficulty, facing Mr. Black: He is in the field for a telephone [1117] company with a crew of twenty men; he had an arrangement made for a man to replace him while he was here, and that man has now left the job, so it is imperative that Mr. Black return. I told Mr. Black that we had him under subpoena, and we are naturally anxious to cooperate, and the arrangement made between Mr. Black and me is that he will call the Clerk, with your Honor's permission, and give him a place that he can be reached by telephone, and then will respond when the Clerk at my request 'phones for him. Now, if that is satisfactory to

counsel and your Honor, I would very much like to relieve him from his personal distress at present.

The Court: Have you any objection to that arrangement, Mr. Olson?

Mr. Olson: No, your Honor.

The Court: How far is his place of work?

Mr. Holman: Chewelah; he's out in the field some fifteen or twenty miles.

The Court: That arrangement can be made, then.

HAWLEY ROBBINS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Hawley Robbins.

Q. Where do you live, Mr. Robbins? [1118]

A. Sunnyside.

Q. Are you now employed by the Concrete Construction Company? A. No, sir.

Q. Were you employed by the Concrete Construction Company in 1944 on Roza Project 1062?

A. Yes, sir.

Q. And in what capacity? A. Carpenter.

Q. A carpenter? A. Yes, sir.

Q. Do you recall, Mr. Robbins, the approximate time that you were employed on the job?

A. I went on the job on September 6, I think it was, in '44.

(Testimony of Hawley Robbins.)

Q. September 6, 1944, and how long, then, were you on?

A. Wait a minute; until February 27, '45.

Q. Now, what part of the work did you work on as a carpenter?

A. I was setting forms in the field part of the time; part of the time I worked in the yard.

Q. Now, in working in the yard did you have an opportunity to and did you observe the type of lumber that was furnished on this job?

A. Oh, I think I did. I cut up an awful lot of it and put it in the forms.

Q. What was the lumber as far as quality was concerned?

A. Well, I'd call it mighty poor lumber for that kind of [1119] work.

Q. Will you describe a little bit to the Court as to what was the matter with it?

A. Well, one thing was it was wet and green lumber, which would dry and shrink up an awful lot, and then it was awful knotty, poor stuff. Some of it was warped to a certain extent.

Q. Now, anything else about the lumber?

A. Well, if I recollect right, we had some second hand lumber at one time in the yard.

Q. How about that second hand lumber?

A. That wasn't very good stuff; checked and broke up quite a lot.

Q. Checked and broke up, you say?

A. Yes.

(Testimony of Hawley Robbins.)

Q. Now, when you worked out on the field, how did you find the excavations when you came up to one to install your forms?

A. Well, the first thing we had to do was find our hub with the tack in.

Q. Find the hub what?

A. With the tack in it, the nail.

Q. Oh——

A. And of course, we had to find our specific stake on there, which would give us our number of our hub and the [1120] distance each way from it, and everything.

Q. Well, why were you doing that, Mr. Robbins?

A. Well, we had to get them, to get our lines from, to go by.

Q. Well, weren't the excavations all completed and ready for you to work on when you got to them?

A. No, sir, they was not.

Q. Well, then, what did you do after you had to check the line?

A. Well, after we got our lines all set up, then we had to fix our grades, find out where we was at.

Q. And what would be the situation after that?

A. The general situation after that was we had quite a lot of digging before we could get down to grade.

Q. What did you find with reference to the floor of the excavations, as to grade and alignment?

A. Well, all the way from an inch and a half to four or five inches too high, as a general rule, most of the time.

(Testimony of Hawley Robbins.)

Q. How about the alignment? Were the vertical neat cut banks in alignment?

Mr. Holman: Well, just a minute; I submit counsel's question is leading.

The Court: Yes, I think it is leading. Sustain the objection.

Q. Well, just describe the parts of the excavation as far as alignment is concerned. [1121]

A. Well, lots of times we had to dig out the banks to get our forms in, in line.

Q. With reference to the outer banks, or the banks of the excavation, were they sloped, or not?

A. No, they was not.

Q. How were they?

A. They was in a vertical or straight up and down position.

Q. And with reference to clearance after you got the panels in, how much room did you have, or how much room did you have in the hole to put the panels in?

A. Well, it was very seldom that we was able to get a strong-back or a whaler in, whichever you may call them, in without doing some digging, and then probably standing on our head to get our wedges in afterwards.

Q. Now, your strong-backs and whalers, without taking the trouble to come over to the model, just tell the Court what they are?

A. Yes, I can explain that. That's two by fours and stuff that goes on the outside of the form, to keep it from spreading out, so it won't spread and swell when the concrete is poured into it.

(Testimony of Hawley Robbins.)

Q. Perhaps I had better have you—would you just step over here, Mr. Robbins? Mr. Robbins, would you just point out on plaintiff's Exhibit 24, being the structure, which part of it is the strong-back or the whalers, as you call [1122] them?

A. Well, it's this part right along right here, this two by four and stuff, it goes here.

Mr. Olson: I wonder, Mr. Clerk, if for the purpose of the record we might identify with a crayon or pen the part that the witness just referred to.

(Whereupon, a portion of plaintiff's Exhibit 24 was marked 24-a.)

Q. Then referring, Mr. Robbins, to 24-a, is that and the corresponding supports what you refer to as the whalers or strong-backs?

A. That is the support that keeps the forms from spreading in and out when you pour the concrete.

The Court: I don't think he understood your question. He's trying to explain it.

Q. What do you call the part of the form there that is marked 24-a?

A. That would be the whaler or strong-back.

Mr. Holman: I have a question while you're over here. Is 24-a, would a similar marking on 26-a be the same?

A. It would be the same.

Mr. Holman: I ask the clerk to mark 26-a, then, please.

(Whereupon, a portion of plaintiff's Exhibit 26 was marked 26-a.) [1123]

(Testimony of Hawley Robbins.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Now, when there wasn't room to put your whalers or strong-backs in, Mr. Robbins, what did you do?

A. Well, we had to dig out so we could get them in.

Q. Then when you had your forms completed in the excavations, what would be the situation generally over the excavations that you worked in with reference to the room or the clearance between the outside panel of your form and the bank?

A. Well, there was practically no clearance, because we'd just dig down enough to get room to put our two by fours in, whalers, so that we could get away from there. As far as clearance, we didn't care about that, because there would be no clearance left at all when we'd slide these two by fours down in.

Q. Now, can you tell us, Mr. Robbins, about how much time on the average it was necessary for your carpenters to spend, and how much did you spend, per excavation on preparing it for the structures, as far as your digging was concerned?

Mr. Holman: Just a minute. May I have that question?

(Whereupon, the reporter read the last previous question.)

(Testimony of Hawley Robbins.)

Mr. Holman: I object to the question, your Honor, [1124] as calling for an answer of the witness based upon speculation and memory, without regard to any of the facts or figures in plaintiff's claim.

The Court: Do you have an objection?

Mr. Hawkins: Your Honor, I think there's been no showing as to how many excavations this man worked on.

The Court: Well, that's true, but he's asking him now what the average time was.

Mr. Hawkins: I contend that unless it is shown how many excavations this man worked on, it would be entirely immaterial; for instance, if he worked on five excavations, and the average time was so much, that would neither prove nor disprove plaintiff's case.

The Court: Well, he can't prove them both at once. You have to prove the number first, you think. Do you intend to apply this to the number of excavations, or is it just general in character?

Mr. Olson: Every time we've got notes, then counsel says we're preparing for a lawsuit, and every time we haven't got them, he says we're not entitled to show them. We're entitled to show the general situation, to lead up to what our actual costs were.

The Court: I'll overrule the objection.

Mr. Holman: May I point out that question as now framed calls for both general, and what way did you do; [1125] it is a prolix question.

(Testimony of Hawley Robbins.)

The Court: How do you mean, both ways?

Mr. Holman: As I heard the question, it was average and what did you do.

The Court: Read the question. I thought he asked before what he did, and now the average time on each structure.

(Whereupon, the reporter read the last previous question.)

The Court: Where is there anything in there, Mr. Holman, about what he did?

Mr. Holman: The latter time, how much time did you spend.

The Court: On the average; isn't that the question?

Mr. Holman: If that's what he means.

Mr. Olson: If I asked him "Just how much was it necessary for you to do," counsel will say it is a conclusion, so I asked how much time he was required to and did spend.

The Court: Overrule the objection.

A. Well, I'd say it would run on an average from four to eight man hours a day.

Q. Four to what?

A. Four to eight man hours a day. [1126]

Q. On each excavation?

A. To an average of that.

Q. Now, is that for each carpenter, or for the two of them together?

A. That would be a man hour, for one man.

Q. And how many carpenters were there working on each structure, in putting in your forms?

(Testimony of Hawley Robbins.)

A. Well, generally two of us worked together.

The Court: I'd like to get this as straight as I can as we go along. It seemed to me you asked him the average time spent per structure, and it seems to me he's answering the average time spent per day. Does he mean to say there's four to eight man hours a structure?

Q. That's what I understood. I'll ask him. Do you mean, Mr. Robbins, that that four to eight man hours is on each excavation, or that time is the time you put in each day?

A. That would be average on each excavation.

Q. And there was two men, two carpenters, working on each structure? A. Yes, sir.

Q. Now, to get it clear, do you mean that each man spent that many man hours per excavation, or what do you mean?

A. I mean that between the two of them it would average that much per day.

Q. Well, now, you say per day again, Mr. Robbins. Do you [1127] mean per excavation, or per day?

A. Well, one man would amount to that many hours, not figuring two of them, but one man. Maybe the two of them would work four hours on the digging, and of course that would mean eight hours, the way I mean it.

Q. I say, per excavation?

A. Per excavation.

Q. Now, what was the situation, Mr. Robbins, with reference to whether or not Macri's excavating crew had excavations ahead to work on?

(Testimony of Hawley Robbins.)

A. Well, that depends on what you mean. Do you mean whether they was ahead ready to work on, or whether there was just holes dug?

Q. Well, just tell what the situation was, Mr. Robbins.

A. Well, the situation was that we never come up, far as I know, any time I was on the job, any place that was ready to go to work on. It had to be remodeled over to get your forms in, of some description.

Q. Now, was there ever any interruptions in your work, or delay, or waiting, because of that?

A. Well, that did delay it quite a lot. Every time we was working with a shovel we was sure delaying our work.

Q. Pardon?

A. Every time we was working with a shovel it was delaying our work, because that wasn't our work, not as a carpenter. [1128]

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Robbins, you went on to this job, did you not, as a carpenter? A. Yes, sir.

Q. Not a carpenter foreman, just a carpenter?

A. Not what?

Q. Not a carpenter foreman?

A. No, I'm just a carpenter.

Mr. Olson: Counsel, I forgot a couple of questions. Shall I do it now, or later?

Mr. Holman: No, strike my interrogation; I'll start again.

(Testimony of Hawley Robbins.)

Further Direct Examination

By Mr. Olson:

Q. Mr. Robbins, how come or why was it, if you were out in the field, that you were back in the yard part of the time too?

A. Well, there was some times I was in there on short spells, we would be short on lumber and stuff to put our forms together in the field, and we'd have to go back in the yard and work around there to get in our time

Q. What kind of lumber would it be you were short of?

A. Well, lots of time we was short of whaler lumber, two by fours. [1129]

Q. And when you got back in the yard was the lumber in the yard, or not there either?

A. No.

Q. Well, you'll have to answer the question; was it or was it not in the yard? A. It was not.

Q. Was there any times, Mr. Robbins, when the carpenters had to sit around?

Mr. Holman: I object to this as very leading, your Honor. He's getting yes-no answers from this witness on his own testimony, and I submit it is not proper.

The Court: Well, that seemed to start out to be leading.

Mr. Holman: Yes, quite.

Q. Well, Mr. Robbins, was there any other, outside of the delay that you've described with ref-

(Testimony of Hawley Robbins.)

erence to excavating instead of building and installing forms, were you delayed in any other manner, and if so, what way, and in what respects?

A. Outside building forms, you mean?

Q. I didn't get your question.

A. I say, did you mean outside of the carpenter work?

Q. No, I mean particularly in reference to the carpenter work. What I'm getting at is was there anything else that you can tell us about the delay, other than the digging [1130] that you did?

A. Oh, there was lots of times we was delayed for lumber, far as that goes, time and again, and there was one time that an order come out there that we wasn't to do no digging; if we come up on to a structure that wasn't up to sub-grade, we was to wait. Well, I was put on a structure, and I had to wait a half a day before the relief man came around; I sat there half a day, me and my men, on account of no sub-grade for us.

Q. Did Mr. Macri's men come back eventually and do the sub-grading, or do you remember?

A. Well, at that time I was taken out of the field and went into the yard, building forms and getting stuff ready for another job, for a tunnel job, and I didn't go back on the job out there after that.

Mr. Olson: You may examine.

(Testimony of Hawley Robbins.)

Cross-Examination

By Mr. Holman:

Q. You say at that time you were taken out of the yard and put on another job, for a tunnel?

A. Well, it wasn't a tunnel, it was kind of a—well, it was a long flume, is what it was.

Q. On this 1062, however?

A. Yes, that was on this 1062.

Q. Now, may I ask, please, you went on the job as a carpenter on September 6, 1944, and you were not, while you were on [1131] the job until February 27, 1945, a carpenter foreman?

A. Not as carpenter foreman, no, sir.

Q. At no time were you employed as an excavator or fine grader?

A. Only when I come up on there, when I had to; not employed as that.

Q. I'm talking, sir, about your employment. You weren't employed that way?

A. I was employed as a carpenter.

Q. And what was your compensation per day as the carpenter?

A. What do you mean by that?

Q. What was your pay?

Mr. Olson: I think, your Honor, that's immaterial.

The Court: I'll overrule the objection.

Q. How can it be immaterial?

A. Whatever the standard scale was at that time. I think it was \$1.40.

(Testimony of Hawley Robbins.)

Q. \$1.40 per hour, sir?

A. It was either \$1.40 or \$1.45.

Q. Can you tell me, counsel?

Mr. Olson: No, I can't.

A. I've forgot just exactly what the scale was. It was standard scale.

Mr. Holman: May I have that 16, Mr. Clerk. It is agreed, counsel, by reference to identification 16, that [1132] the pay of the carpenters during the period this man worked was \$1.40 per hour?

Mr. Olson: That's correct.

The Court: The record may show that.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Now, how long after you started to work in September, 1944, did you stay in the yard making forms?

A. I didn't stay in the yard when I first started to work at all; I was out in the field.

Q. Oh; how long, then, was it before you went to the yard? Do you know, sir?

A. I don't recollect when I did go back into the yard.

Q. Had you ever been a fine grader?

A. Had I ever been a fine grader?

Q. Yes, sir, before you went to this job?

A. Oh, I worked on a lot of work, dirt work, and stuff like that, before that, on other jobs. Not on that one.

(Testimony of Hawley Robbins.)

Q. Sir?

A. I've worked at that kind of work on other jobs.

Q. And on Reclamation projects, sir?

A. No, sir.

Q. So this was your first reclamation project you worked on? A. No, sir.

Q. What was the first one?

A. I worked on one, the Roza Project, down by Zillah. [1133]

Q. I guess you misunderstood me.

The Court: He said he worked before as a fine grader, but not on Reclamation projects. He's worked on other Reclamation projects as a carpenter.

Q. Then this was the first position that you worked with respect to excavation, in doing excavation, right? A. Well, yes, where I had to.

Q. All right, sir. Now, when you first went to work, were you taken out into the field?

A. Sure.

Q. And you didn't build the panels for the forms?

A. No, the panels was built in the yard.

Q. Sir?

A. The panels was built in the yard.

Q. At the time you came on that job they were pouring concrete, were they not?

A. Yes, I believe they were.

Q. Sir? A. Yes, sir, they were.

(Testimony of Hawley Robbins.)

Q. And your employment was during the period that the carpenters—strike that—that the concrete was being poured, right?

A. Well, they were pouring concrete in that period, yes.

Q. Mr. Robbins, were you employed locally, or had you been employed with Concrete Construction Company before that? [1134]

A. Before that?

Q. Yes.

A. No, I was employed by them, that was my first time.

Q. In other words, you were a local man?

A. Yes, sir.

Q. And what was your particular function with respect to the assembling of panels into forms? What did you do?

A. Why, I assembled them, set them up, put them together.

Q. Well, did you have a carpenter foreman there that directed you, or not? You said there were two of you; was the other a foreman?

A. No, there was no foreman with us. We worked together. We had our print, and went by our print.

Q. Sir?

A. I say, we had our cut, and went by our cut.

Q. Your cut?

A. Yes, the print or form, how it was supposed to be.

Q. The lay-out?

A. The lay-out.

(Testimony of Hawley Robbins.)

Q. Referring to Exhibit 12?

A. Yes, this would be the form.

Q. Can you talk up a little, Mr. Robbins? It's hard to hear you, sir. Then you as carpenter and one other with you——

A. Yes, sir.

Q. ——assembled the forms? [1135]

A. Yes, sir.

Q. From the panels? A. Yes, sir.

Q. That you brought out on the job; did you pick the panels, or were they sent out to you?

A. They were sent out on the job.

Q. Now, how long did you stay out in the field before you went to the yard to work in the yard?

A. Well, I can't recollect just exactly.

Q. Well, will you please do your best? You said you started September 6.

A. I don't know for certain whether it was in January or December, some time, when I went back into the yard.

Q. In other words, it is your best recollection that from September 6 until December or January you stayed in the field, and not in the yard, sir?

A. Not continuously in the yard. I was in the yard for short times.

Q. Yes, but your operations were in the field?

A. Supposed to be, yes.

Q. Yes, sir. Now, then, the thing I'm interested in is when it was this wet lumber came to you.

A. Well, I couldn't say as to when that was.

Q. When was it that the knotty lumber came to you? Was it all the same time, or different times?

A. It was all in the same time.

(Testimony of Hawley Robbins.)

Q. All right; then it was wet, and it was knotty, and what else? A. It was green, too.

Q. Well, that's what you mean by wet, isn't it?

A. Wet and green.

Q. In other words, fresh cut, sir?

A. Yes, it would be.

Q. When was that, approximately?

A. Well, I wouldn't say when it was brought in.

Q. Well, could you tell me whether it was September or January?

A. Well, I couldn't say what month it was in; I know it was brought in there.

Q. Did you make any report? Who was your superior, Mr. Darcy? A. Yes, sir.

Q. He was in charge there as chief carpenter foreman, was he not?

A. He was in charge of the job.

Q. And did you make any report to him of that lumber?

A. He was right there and seen it himself.

Q. Please, sir, I asked you if you made any report?

A. No, I didn't make no report to him.

Q. All right. You told counsel that you had lots of digging [1137] to do, that the excavations were from one and a half inches to four inches or five inches too high. Now, had that been fine graded four to five inches too high, sir?

A. Well, if they had been fine graded they sure wasn't fine graded down to grade.

(Testimony of Hawley Robbins.)

Q. No, had they been fine graded—you know what a fine grade is, do you not, sir? A. Yes.

Q. Well, had they been fine graded?

A. Well, I think they attempted to fine grade them, but they didn't fine grade them.

Q. Then your testimony is that they had been fine graded as much as four or five inches too high?

A. Yes, some of them was.

Q. When was that?

A. Well, that was all the way through on the job.

Q. All right, give me when you found any fine graded four or five inches high.

A. That's an awful hard thing to say, this long a time.

Q. Well, this is rather an important matter. Can you tell me approximately when, sir?

Mr. Olson: Your Honor, he's answered "all the way through the job."

Mr. Holman: May it please the Court, I just would appreciate it if counsel would not interrupt. If [1138] he wants to make an objection, that's all right.

Mr. Olson: That's what I'm trying to do, on the ground the witness has said it was all the way through. Now, he says, "Can you state a time"; I don't see what he could do.

Mr. Holman: In other words, counsel would like to cross-examine.

The Court: What is the last question?

(Testimony of Hawley Robbins.)

(Whereupon, the reporter read the last previous question.)

The Court: I'll sustain the objection. He already said "all through the job," as I recall.

Q. Four or five inches all through the job, sir?

A. I didn't say four or five; I said they run from one and a half to four or five.

Q. That's what I had there. Now, what I'm asking you, I think it is proper under the witness's answer, can you give me even a lateral where you claim there was four to five inches above grade after it had been fine graded, even the lateral?

A. I couldn't give the numbers of the laterals now.

Q. Can you give me the stations, the structures?

A. No, I couldn't give you the numbers on them, because I didn't mark them down, and don't know what they were.

Q. Did you make any report thereon to your superior, either [1139] your chief carpenter foreman or Mr. Darcy? A. Yes, I say we did.

Q. Did you give them a station where you found this?

A. Well, he knew what station I was on.

Mr. Holman: I move that be stricken, your Honor. I asked if you gave it; in other words, here's a witness's conclusion. I don't think that is proper.

The Court: You asked if he reported, and he said he did. Now you're asking if he reported the number of the station. What is the answer to that?

(Testimony of Hawley Robbins.)

Mr. Holman: He's stating that he knew the other man knew.

The Court: That will be stricken.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: Answer yes or not.

Mr. Olson: I think it is wholly immaterial.

The Court: It seems to me a useless question, but did you tell them the station?

A. I didn't necessarily tell them the station.

The Court: All right, the answer is no.

A. They knew what it was.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you make any record yourself of any of the stations where you found fine grading too high?

A. No.

Q. Now, may I understand, sir, is it your testimony that for, let's say roughly in excess of 500 structures, call it 500 structures, for the purpose of illustration here, that for 500 structures on 1062, they averaged from four to eight man hours per day, right? In other words, 500 times four of 500 times eight man hours per day, is that correct?

The Court: Just a moment. I don't think that's a completed question, is it?

Mr. Holman: I thought it was, your Honor.

The Court: You asked him for an answer, be-

(Testimony of Hawley Robbins.)

fore you got through, you said they averaged four to eight man hours; for what? Do you mean extra work, or total work?

Mr. Holman: Taking 500 structures, do the 500 structures average four man hours per day, or eight man hours per day, or between that?

The Court: For what?

Mr. Holman: On his testimony here as to excavations.

The Court: Well, you hadn't said so in your question.

Mr. Holman: I see, your Honor. Strike the question and I'll ask it over.

Q. Assuming that there are 500 structures on this job, is it [1141] your knowledge that there was four man hours, at least, per structure, per day, expended in excavation?

A. Well, I wouldn't say as to the complete job, because I didn't work on every one. I'm going by what structures I worked on.

Q. Then when you answered counsel "per structure," you meant the structures you worked on only? A. Yes.

Q. How many structures did you work on?

A. I couldn't say as to that, but quite a few.

Q. How few did you work on? At least how many did you work on?

A. Well, I think I set up around, between 75 and 100 of them.

Q. You set up between 75 and 100 structures?

A. That I worked on, I'm pretty sure.

(Testimony of Hawley Robbins.)

Q. But you can't tell me the laterals, and you can't identify the structures?

A. I couldn't, not now. I kept no record of it.

Q. Now, then, is your testimony with respect to that average limited to the structure area in which you set up structures?

A. Well, it's limited to the ones that I worked on.

Q. That's what I want to get at, sir. Now, you say the average was from four to eight hours a day?

The Court: Just a moment, Mr. Holman. Didn't he [1142] say four to eight man hours per structure, on each structure?

Mr. Holman: No, a day on each structure, your Honor; four to eight man hours a day on each structure, is what I had.

The Court: All right, go ahead.

Q. Isn't that correct?

Mr. Olson: No, I understand that's four to eight man hours per structure.

The Court: I asked specifically whether he was talking about days or structures, and he said structures.

Mr. Holman: I think that was clarified, your Honor.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Then it is your statement, sir, that there were at least 300 man hours of your time or of the two of you, on the 75 structures, minimum, that you worked on, is that right?

(Testimony of Hawley Robbins.)

A. I think it would average to that.

Q. Sir?

A. I think it would make an average of that.

Q. Why do you say from four to eight hours?

A. Because some of them we run less, and some of them more. Some more digging than others.

Q. None of them less than four hours?

A. Not that I know of, on anything I worked on. [1143]

Q. And none of them more than eight hours?

A. Well, there might have some of them run more than eight hours. I said that would be an average of that.

Q. All right, sir. Was there a time, sir, that you worked exclusively in the yard? Was there a time that you worked exclusively in the job yard as distinguished from working in the field?

A. Yes, along toward the latter part.

Q. How long a time did you work in the job yard?

A. Well, I believe it would be a month and a half or two months, something like that.

Q. Sir?

A. Around a month and a half or two months, toward the last of it.

Q. Around a month and a half, you say?

A. Something like that; I wouldn't say.

Q. Then that is approximately ninety days you spent on the structures?

A. Huh?

(Testimony of Hawley Robbins.)

Q. Approximately ninety days you were on the structures?

A. Well, I couldn't say for certain as to that.

Q. You told counsel that one time an order came out "that we weren't to do any digging." Order from whom, and how did it come out to you, sir?

A. I heard that come through Macri. [1144]

Mr. Holman: I move that that be stricken, your Honor. It is strictly not responsive. He's telling what he heard.

The Court: I'll grant the motion to strike. He can say as best he can where the order came from.

Q. How did the order come to you, sir?

A. The order come to me from my foreman.

Q. And who was he? A. Pat Darcy.

Q. Pat Darcy told you this?

A. That there was to be no more digging.

Q. Yes, sir. All right, sir; and when was that?

A. Well, I couldn't say as to the specified time.

Q. Can you give me the month, sir?

A. Oh, I don't know as I could, now.

Q. Can you tell me whether you got that while you were out setting forms, or while you were in the job yard?

A. That was while I was out setting forms.

Q. Out setting forms. All right. It was not a written order? A. No.

Mr. Holman: Just told to you. That's all.

(Testimony of Hawley Robbins.)

Cross-Examination

By Mr. Hawkins:

Q. Mr. Robbins, do you recall any time when there were excavations that were fine graded by Macri and Company [1145] ready to receive forms?— A. No, I do not.

Q. Just a moment, I haven't finished my question; and you did not have the forms ready to put in these excavations?

A. No, I don't recall no time but what we had forms ready.

Q. Isn't it a fact, Mr. Robbins, that there were a great many occasions when you had forms ready for excavations that were not fine graded, and at the same time there were excavations that were fine graded, but for which you did not have forms ready?

A. No, I don't recollect of any time that happened.

Q. You don't recollect of any such time? Mr. Robbins, I take it you've been a carpenter a good many years, is that right?

A. Well, one or two years.

Q. One or two years? I understood that you had done some work, form work, prior to the time you were on this job; is that right, or not?

A. For other parties?

Q. Yes. A. Yes, sir.

Q. And is it not true, Mr. Robbins, that the car-

(Testimony of Hawley Robbins.)

penters setting the forms always have to do a certain amount of shovel work?

Mr. Olson: You mean on this job [1146]

Mr. Hawkins: On any job.

Mr. Olson: That's objected to, if the Court please, as being immaterial, what they had to do on other jobs. A. No, it is not.

The Court: Well, I'll overrule the objection. He answered, I think.

Mr. Olson: I'll withdraw the objection, then.

Q. It is your testimony, then, that a carpenter never, in setting forms, has to use the shovel?

A. Not if he's caught with his union man, he won't.

Mr. Holman: I'm sorry, your Honor, I just can't hear this witness.

The Court: Well, I think the answer was not responsive.

Q. As I understand it, he said if you're a union man you don't get caught with a shovel in your hands, or something of that sort, but you used a shovel on this job, didn't you, sir?

A. Yes, sir.

Q. And you're a union man?

A. Well, I'm supposed to be, but I broke the union rules out there to keep going.

Q. As I understand it, you were out there from September 6, 1944, to February 27, 1945? [1147]

A. Yes, sir. .

(Testimony of Hawley Robbins.)

Q. That would be a total of 170 days, isn't that right?

A. Well, I couldn't say for sure; I never figured it up.

Mr. Olson: That's mathematical, your Honor.

Q. And there's 170 days between those two dates; assuming it is 170 days, did you work Saturdays on this job? A. Yes.

Q. All day? A. Yes.

Q. This was a six day week? A. Yes.

Q. Did you work Sundays on this job?

A. No.

Q. Taking off Sundays and holidays, or a total of about 25 days, for that purpose, that would leave about 130 days that you were actually on the job out there; would that be about right, to your recollection?

A. I couldn't recollect how long it was, far as that goes.

Q. Then you testified you spent about a month and a half in the yard, is that right?

A. Yes, as near as I can recollect.

Q. That would be about 60 days; deducting that from the figure of 130, that leaves about 90 days you spent out on forms, sir, setting forms?

A. I couldn't say. I know I was working out there. [1148]

Q. Now, you testified you set the forms for 100 structures; I believe that was your testimony?

A. I set between 75 and 100.

(Testimony of Hawley Robbins.)

Q. Yes, 100 structures. Now then, if you spent eight hours per structure on shovel work, that would be 100 days, would it not, spent on shovel work?

A. I didn't say that we spent eight hours total.

Q. Yes; that's what I'll get at in a moment; and as a matter of fact, however, you only spent a total of 90 days, not only shovelling, but setting the forms too?

A. Well, there was two of us working together all the time.

Q. Well, there must be something radically wrong with your estimate of four to eight man hours per day per structure then, isn't there?

Q. That's what I tried to say. I understand this witness testified that on each structure there was spent four to eight man hours in shovel work. My question was, then, there must be something radically wrong with your——

Mr. Olson: That question is argumentative. Counsel's mathematics have been wrong from the beginning. The witness said he worked a month and a half. Counsel [1149] got that 60 working days, but his last question is certainly argumentative.

The Court: What was the last question?

Mr. Hawkins: My last question was that there must be something radically wrong with his estimate of four to eight man hours per structure spent in shovel work.

The Court: Well, I'll sustain the objection. It is argumentative.

(Testimony of Hawley Robbins.)

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Did you work on any structures of which Exhibit 23 and 24 are typical, that is that first model over there?

A. Structures of that description?

Q. Yes. A. Yes, sir, I have.

Q. Can you tell me whether that form was all set in at once? A. No, it wasn't.

Q. You'd set in part of the form?

A. Set in part of the form at a time.

Q. That is one panel at a time?

A. One panel at a time.

Q. What I'm getting at is this: would you set half of that form and pour it, and then set the remainder and pour the balance, or was there just one setting and one pour?

A. There would be one setting and one pour.

Q. One setting and one pour; you would put in that entire [1150] form at once, then, before there was any pour?

A. You would put it in and get it all fixed, yes.

Q. Did you have any trouble with the dirt caving down when you set your forms?

A. No.

Q. You never knocked any dirt down in the trench when you set your forms?

A. Well, we did in some places, yes.

Mr. Hawkins: That's what I thought. That's all.

(Testimony of Hawley Robbins.)

The Court: Redirect?

Mr. Holman: May I have just a minute, your Honor?

The Court: Do you have any examination, Mr. Ivy?

Mr. Ivy: No, your Honor.

The Court: And you say you have no redirect?

Mr. Olson: No, your Honor.

The Court: The witness may be excused, then.

(Whereupon, there being no further questions, the witness was excused.)

ISAAC A. LYONS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Isaac A. Lyons.

Q. Where do you live, Mr. Lyons?

A. Sunnyside. [1151]

Q. Are you now employed with or have any connection with the Concrete Construction Company?

A. No, sir.

Q. In 1944 were you employed on specifications 1062 of the Roza Project?

A. I went to work for the concrete outfit of Portland on the 17th day of September, and quit March 3, '45.

(Testimony of Isaac A. Lyons.)

Q. And where was that employment, Mr. Lyons?

A. Out on the Roza.

Q. And in what capacity were you employed?

A. As a carpenter.

Q. Now, were you working in the field setting forms, or in the yard?

A. In the field most of the time; once in a while in the yard.

Q. Now, in the field, would you just, as you came up to an excavation would you just describe what you did with reference to the excavation?

A. First thing you look for your hub. There's a stake there with your figures on, what you want. You measure from there to set it. On the opposite direction from it would be another. You get your lines from there. You get your elevation from on this stake, what you want. Then there's supposed to be some other hubs to get your line wall, and sometimes it wasn't there and you had to [1152] figure it out from your hub stake.

Q. Now, what did you do then with reference to the excavation, if anything?

A. Well, when you got your elevation, you see where your forms, if your ground is low enough for your forms to fit on.

Q. And what did you find out in that regard?

A. Sometimes it wasn't.

Q. And what did you do about it?

A. Well, we had to grade out.

Q. And how did you do that? What kind of tools did you use?

(Testimony of Isaac A. Lyons.)

A. Had to use a shovel, and sometimes a pick.

Q. Now, how general would that be, Mr. Lyons, as to the excavations that you worked on?

A. Well, sometimes it amounted to—sometimes we had to dig an end out for a line wall.

Q. Dig what out?

A. The end, so the back wall would fit in; they wouldn't have it dug long enough for your outside wall; it run all the way from an hour, a man hour, to eight man hours on some jobs.

Q. Now, you say on some jobs?

A. Yes, some laterals it wouldn't be that way all the way through; some of them would be harder, some of them more banks to take off, where you had a big form to put in, a [1153] long form; sometimes they didn't have it dug long enough for your outside form.

Q. Now, your one to eight man hours, Mr. Lyons, that refers specifically to what?

A. One man hour being just one hour.

Q. On what?

A. On this digging. If it was eight you would figure eight man hours.

Q. Well, are you referring to that much per day, per week, or what?

A. Well, it wouldn't be every day that way, but when you go to this form you set in, that's the way it would be. Some of them was bigger, and some of them small.

Q. Well, how many structures would you spend that much time on?

(Testimony of Isaac A. Lyons.)

A. Well, I couldn't swear to that. As a general rule I was on pretty good-sized forms, and it would take a little longer to set them in.

Q. Well, what was the situation with reference to the banks?

A. The banks was pretty steep. When we put our strong-backs on lots of times all we'd do, I shoved the whole thing down and stuck in the she-bolts, and let the party that wants to take the strong-backs out figure out a way to get them down. I didn't slope the banks down. I dug down and bent over and got my she-bolts in. Whoever took [1154] the forms out, they had to figure that out.

Q. Was there room, without digging, to get your strong-backs in, or what was the situation?

A. No, sir, with deep holes where they set low there wasn't.

Q. And what did you do?

A. We wiggled down and reached down and got our strong-backs in, and then we dug out and got the she-bolts in. Our she-bolts had to fit down between our strong-backs; we had to dig a hole so we could get her in.

Q. Now, on your arrival were the holes and the banks of the excavations in proper alignment with reference to these hub stakes you refer to?

A. Well, you see, that's your center, and you took your center and measured both ways to the center of where your back wall goes. Some of them is 26 feet long, 24 feet, I think it was, and lots of times your ends wasn't dug long enough for that, and we'd have to dig out for the ends.

(Testimony of Isaac A. Lyons.)

Q. Now, were there, when you finished with an excavation and got your structure in, what was the situation with reference to whether or not the next hole was ready for you to work in?

A. Pardon me?

Q. When you had your forms in and completed with one excavation, so that you then went to the next one, what was [1155] the situation with reference to whether you would find the next one ready for you to work in?

A. Well, the majority, all of them, we had to do something to.

Q. Now, you say you were in the yard part of the time too?

A. In and out. I wasn't in the yard so very much.

Q. Why was it you were in the yard?

A. Well, lots of times we would be short of material out there.

Q. So then you would do what in the yard?

A. We'd come in and prepare forms.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Lyons, did you have an opportunity to and did you examine the lumber that was furnished on this job?

A. Well, the lumber was——

(Testimony of Isaac A. Lyons.)

Q. Well, first, did you? A. Yes, sir.

Q. And would you describe that lumber as far as quality was concerned, that you saw?

A. Well, a lot of the lumber we repaired forms with was awful warped, the new lumber was cracked and was awful wet and knotty; we'd have to use the lumber with the [1156] knots in up to a certain size hole, and then we would tin them; we cut tin and nailed over the knot holes.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Lyons, can you tell me the location with respect to laterals? A. No, sir.

Q. I hadn't finished my question yet.

A. When we got through one lateral——

The Court: Just a minute, wait until he finishes the question.

Q. Can you tell me the laterals upon which you say they had deep holes that you worked on?

A. I couldn't tell you laterals because we——

Q. Can you tell me the structure numbers?

A. No, sir.

Q. Did you give to Mr. Darcy or any other of your superiors any record of the holes you worked on? A. Every time he'd come, he'd move us.

The Court: Just a moment; just answer the question.

Mr. Holman: I move that be stricken.

The Court: Yes, it may be stricken.

(Testimony of Isaac A. Lyons.)

A. Yes, sir.

Q. What I'm asking you is this: Did you give Mr. Darcy a record of the time you spent on these various holes, for [1157] digging?

A. Every time we sub-graded any we give him the time.

Mr. Olson: Did you give him——

Mr. Holman: I think he answered.

(Whereupon, the reporter read the last previous answer.)

Q. And would you give him the station?

A. He had our station number. He kept track of our station number we worked at, we didn't give him the station number.

Mr. Holman: I move that first part be stricken.

The Court: I think it's explanatory.

Mr. Holman: That isn't my point. He's telling what Mr. Darcy did, and I submit that's not part of the answer.

The Court: Well, he says that he kept track of the time and gave Mr. Darcy the time and the structure they were working on, but not by number; that's what he's testifying, isn't it? A. Yes, sir.

The Court: I think that is nearly enough responsive so that we can understand.

Q. What do you mean by the structure you were working on, but not the number?

A. We never kept track of the number of the structure we [1158] worked on at all. We went out on a structure and worked on it, and when we fin-

(Testimony of Isaac A. Lyons.)

ished, I moved up to another one. I never kept tab of the structure we were on.

Q. You say Mr. Darcy was there?

A. He'd come and get us when we finished our job, and delivered us to the next.

Q. Now, is that the time, right then, that you gave Mr. Darcy the amount of time that you excavated?

A. Yes, sir.

Q. You would give the time, that you had done so much work on a structure?

A. So much excavating, yes, sir.

Q. And would you give him the amount of excavating you did?

A. That's the amount of time we put on excavating.

Q. Yes, sir. Now, did you yourself do the measuring for the structures?

A. There was two of us.

Q. Well, you and another carpenter?

A. Yes, sir.

Q. Not Mr. Darcy?

A. All he done was delivered us there.

Q. He just delivered you, and then he'd go on somewhere else?

A. Tell us what it was, and that would be all.

Q. And what Mr. Darcy would do would be to show you these lay-out drawings, that is, Exhibit 12, and say "This is [1159] the structure"?

A. The stuff was there on the ground, and he told us there what to do, and he'd come back in the meantime.

(Testimony of Isaac A. Lyons.)

Q. The forms would be delivered there, you wouldn't deliver the forms there; you wouldn't go to the yard and get them, would you?

A. We couldn't.

Q. Well, you didn't, did you, sir?

A. No, sir.

Q. They would be there on the job, and then you'd assemble the forms? A. Yes, sir.

Q. Did Mr. Darcy furnish you with the picks and shovels? A. Yes, sir.

Q. Can you recall any one structure that you can identify to the Court now that you say was a deep structure? A. By number?

Q. Yes, sir. A. No, sir.

Q. Now, you say sometimes you had to dig the end out? A. Yes, sir.

Q. That would be the extension walls——

A. Yes, sir.

Q. ——of the structure, because the excavation was not as wide as the forms had been built, is that right? [1160]

A. It wasn't built long enough for the forms.

Q. Yes, sir, and in those instances do you say that the excavation was not as wide as the drawing?

A. Yes, sir.

Q. You say they were not as wide as the drawing?

A. Wasn't laid out to the classification of the form.

Q. Well, isn't it a fact that without checking as to that length, you excavated to make your form fit on those wings?

(Testimony of Isaac A. Lyons.)

A. If your forms call for a hole larger than the one that's excavated, you sure would have to excavate it out to get it in, wouldn't you?

Q. Yes, sir.

A. That's just what we done.

Q. Now, regardless of what the forms called for, the forms that were actually delivered were the ones you set in? A. Yes, sir.

Q. And if the excavation was not far enough out for those wings, those walls, then you would excavate on out? A. Yes, sir.

Q. In other words, you made it fit the form, correct? A. That's it.

Q. Now, may I ask, please, sir, when you say it ran all the way from one hour to eight man hours on some jobs, is the substance of your statement as I have my note, you [1161] mean, do you not, that it ran all the way from one man hour to eight man hours per structure, depending on the size of the structure? A. The depth, the width, yes, sir.

Q. I have a clear understanding of that, have I not? A. Yes, sir.

Q. Did you keep a time book yourself?

A. No, sir.

Q. You were not a carpenter foreman, were you?

A. No, sir.

Q. Who was your superior carpenter foreman?

A. Darcy.

Mr. Holman: Mr. Darcy. That's all.

(Testimony of Isaac A. Lyons.)

Cross-Examination

By Mr. Hawkins:

Q. Were you in Court when Mr. Darcy was testifying? A. Pardon?

Q. Were you in court when Mr. Darcy was testifying? A. I didn't understand you.

Q. I say, were you in court when Mr. Darcy was on the witness stand? A. No, sir; I wasn't here.

Q. I see. When you were setting forms were Mr. Macri's fine graders ever in your way?

A. Who?

Q. Were Mr. Macri's fine graders ever in your way? [1162]

A. He wasn't there when I first went there.

Q. No, I say Mr. Macri's fine graders.

A. I never seen any of them.

Q. You never saw any of them? They were never in your way?

A. Well, the fact is they never was around, if they had any.

Q. Yes. How many structures did you work on, sir? A. Sir?

Q. How many structures did you work on?

A. I never kept track of them.

Q. Do you have any idea how many there might be? A. No, sir.

Q. You couldn't estimate? A. No, sir.

Q. Did you work on all of the structures on the job?

A. I didn't work on all of them.

(Testimony of Isaac A. Lyons.)

Q. You didn't work on all of them?

A. No, sir.

Q. Is it not a fact, Mr. Lyons, that there were excavations that were fine graded by Macri for which you did not have forms ready?

A. Well, I don't know of any I was on but what we didn't have to do something. Sure enough we didn't turn no time in for some of them, because it only took a little time to do it.

Q. I don't think you get my question. Were there any excavations fine [1163] graded for which you did not have forms ready at the time they were fine graded? A. I don't know about that.

Q. You don't know about that, and as a matter of fact, did you not have forms ready for excavations that were not fine graded when at the same time there were excavations that were fine graded for which you did not have forms ready?

A. I couldn't say about that.

Q. So fas as you know that was never true?

A. I wouldn't say anything about that. I wasn't in the field running around to see what they had done. We was taken out to where there was forms.

Q. Who directed you as to which excavations to work on? A. Our foreman.

Q. Mr. Darcy? A. Yes, sir.

Q. Did you work on any structures such as 23 and 24, the model over here? A. Yes, sir.

Q. Was the form completed and installed before any concrete was poured? A. Yes, sir.

Q. In other words, you did not build part of the

(Testimony of Isaac A. Lyons.)

structure at one time, pour the concrete, build the remaining part [1164] of the structure and pour the balance of the concrete? It was all poured at once?

A. I think you'd have to do it that way.

Q. No, I'm just asking you if you did.

A. It was all built before the concrete went in.

Q. It was all built complete before the concrete went in? A. Yes, sir.

Mr. Hawkins: That's all.

Mr. Ivy: No questions.

The Court: Any redirect?

Mr. Olson: That's all. May Mr. Lyons and Mr. Robbins be excused, your Honor?

The Court: All right, they may be excused from further attendance.

(Whereupon, there being no further questions, the witness was excused.) [1165]

WILLIAM E. SCHAEFER

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

By Mr. Olson:

Q. You have already been sworn, I think, Mr. Schaefer? A. Yes.

Q. Your name is what?

A. William E. Schaefer.

Q. And you are a brother of M. C. Schaefer, plaintiff? A. Yes.

(Testimony of William E. Schaefer.)

Q. Where do you live, Mr. Schaefer?

A. Portland, Oregon.

Q. Now, what capacity, if any, did you have on this job 1062? A. General superintendent.

Q. And were you at the same time general superintendent of any other jobs? A. Yes.

Q. Now, there's been testimony, I think, by your brother, Mr. Schaefer, that during the time——

Mr. Holman: Just a minute. Your Honor, I submit that is a leading type of question.

The Court: Well, I think it is preliminary. Go ahead and we'll see what you're going to.

Direct Examination

(Continued)

By Mr. Olson:

Q. There's been testimony by your brother, Mr. Matt Schaefer, that during the time that 1062 was being performed, this period of approximately twelve and a half months, that during that time Mr. Schaefer and the Concrete Construction [1166] Company had some 200 other jobs. Now, my question is, would you describe, not in detail but just in general, the type of these jobs?

A. Well, that would be pretty hard, because they run all the way from a sidewalk patch to another job that required about four or five thousand yards of concrete; driveways, steps, basement floors.

Q. Did you have 200 jobs going on besides this 1062? A. Not at one time.

Q. Now, when were you first on this Roza Project, 1062? A. March 9.

(Testimony of William E. Schaefer.)

Q. That was prior to the contract?

A. Yes.

Q. Now, when were you on it next with reference to going to work on the job?

A. I believe it was March 15.

Q. All right, now on March 15 did you take anybody with you, or what did you do on March 15?

A. I brought up a carpenter from Portland.

Q. A carpenter from Portland?

A. Yes, A. E. Mercelle.

Q. Was there anybody else that you put on the job then? A. I don't believe that day.

Q. All right; now, was there anybody on the job then that you took into your employ? [1167]

A. Yes.

Q. And who was that?

A. John Klug and Bob Monrad.

Q. And Bob Monrad? A. Yes.

Q. And Mr. Monrad and Mr. Mercelle are two of the gentlemen who have testified here in court?

A. Yes.

Q. Now, what did you put them to doing, if anything?

A. They were already started to building form panels. John Klug was the foreman and he gave Mercelle orders on what he wanted him to do.

Q. All right; now, do you know when you were up on the job again, approximately? You can refer to some memo, if it is a memo that you yourself made, as to when you went.

A. I have a note that I took on the job.

(Testimony of William E. Schaefer.)

Q. I just want to know the approximate date that you were on there next.

A. I think it was about March 31. I went up to build a cement shed.

Mr. Holman: This is all 1944?

Q. The dates are all in 1944? A. Yes.

Q. You were up for what purpose?

A. The building of a cement shed. [1168]

Q. This is still setting up your project?

A. Yes.

Q. Well, I will ask you during that time what was going on with reference to building panels?

A. Still building panels in the yard.

Q. Were there any excavations ready yet?

A. No.

Q. All right; when did you come up next?

A. That was April 15.

Q. All right; and what was going on? What did you see on that date?

A. That's when they started to build structures out in the field.

Q. Now, what was the situation, or describe the the type of excavations into which you were setting the structures, and what took place, and what was done.

A. Well, Fred Waltie, the superintendent, and——

Q. Whose superintendent?

A. Concrete Construction Company superintendent, and a few of the carpenters were started in structures 1, 2 and 3 when I got there, and they

(Testimony of William E. Schaefer.)

were digging, they were excavating some of the vertical walls so they would have room for their forms, and one part of this hole they were excavating for the invert, that is the floor to receive the concrete. They showed me where the excavation was [1169] too close, they couldn't get their form in, so they started digging, so I got in touch with Mr. Staples, Macri's foreman——

Q. Who was he?

A. Macri's superintendent, and showed him the situation, and told him we didn't want that to happen very much there, because right now we was willing to get started on this, and to see that the rest of the holes were large enough so that we could get in with the forms, and I hadn't seen any of them that was excavated one foot out and at a 1 to 1 slope.

Q. Is this what you told Mr. Staples?

A. Yes; well, he says "Bill, we're just getting started here; give me a little time; I'll appreciate it if you'd have Fred help me check a few of these."

Q. That is Fred who? A. Fred Waltie.

Q. Your superintendent?

A. Concrete Construction superintendent, so we went down and checked a few of them. He says "Well, I'll try and get some fine graders in here to get these things on the button for you."

Q. Now, about how long were you there on the job at that time, Mr. Schaefer?

A. I don't remember just how long I was on the job and back [1170] to Portland and back on the job.

(Testimony of William E. Schaefer.)

Q. Well, do you remember approximately how long you were out there on April 15? Just that day, or did you stay longer?

A. No, I was there several days.

Q. And were you right on the job and out in the field during that time? A. Yes.

Q. What developed, if anything, with reference to the excavations being brought to grade?

A. Still off grade.

Q. Well, what did you do about it, then, from then on? A. Kept complaining to Mr. Staples.

Q. Well, then——

Mr. Holman: Again could you talk a little louder? We just don't get you here.

A. I kept on complaining to Mr. Staples.

Q. Then what did you do, Mr. Schaefer? Did you stay there or did you go someplace?

A. Stayed on the job several days, and then I went back to Portland.

Q. All right, and who did you see in Portland?

A. M. C. Schaefer, my brother.

Q. All right; now, you can't relate the conversation between you and your brother, Bill, but was anything done about arranging for a meeting then, on the field? [1171] A. Yes.

Q. And for what date?

A. I believe it was for the 28th of April.

Q. All right, then did you come back again to 1062? A. Yes.

Q. And who with? A. M. C. Schaefer.

Q. All right; now, just go ahead and tell what happened on the 28th of April.

(Testimony of William E. Schaefer.)

A. Well, we went to the job office expecting to meet Mr. Macri.

Q. Was he there?

A. He wasn't there on the 28th.

Q. All right: what did you do then, if anything?

A. So we wanted to see him while we were there, regarding the excavation, so Mr. Staples I believe called him, and he was on the job the 29th.

Q. And you met Macri the next day?

A. Yes.

Q. All right.

A. And we went out in the field, and again Fred Waltie, our superintendent, went down and he stretched a line and took measurements to show what was wrong with these excavations.

Q. Did Mr. Staples say where Mr. Macri was the 28th, and why he wasn't there, do you recall?

A. I believe he called him at Yakima.

Q. Did he state to you why Mr. Macri wasn't there the 28th, the day you first went to meet him? If he didn't, if you didn't hear what he said, why, just tell me.

A. I don't know, exactly.

Q. You don't remember Mr. Staples saying anything why Macri wasn't there on the 28th?

A. Well, he says he couldn't get hold of him up at Seattle; he had called Seattle and couldn't get hold of him.

Q. All right; the next day did Mr. Macri meet with you on the job?

A. Yes.

Q. All right; state what you did, where you went, and what was said.

(Testimony of William E. Schaefer.)

A. Well, Fred Waltie checked, oh, about three or four of the excavations.

Q. Was that with you? A. Yes.

Q. And who was together there then?

A. M. C. Schaefer, Mr. Macri; and Mr. Staples, as we were checking, drove up on the job where we were. He come from another part of the job.

Mr. Holman: May I get this correct? You say Mr. Schaefer, Mr. Staples and Mr. Macri came up together, or was Mr. Schaefer with you? [1173]

A. Mr. Schaefer, Mr. Macri and I, we drove out in my car.

Mr. Holman: Oh yes, I see.

Q. All right, and who did you meet out there then?

A. Mr. Staples, he come from another part of the job. He took another road and come on out.

Q. All right; now, what did you do and what was said in Mr. Macri's presence and in Mr. Staples' presence?

A. We complained about the excavations.

Q. What did you say about them?

A. They were all dug vertical, none of them room enough to put in our forms, she-bolts or strongbacks, and the excavtion wasn't any part of Concrete Construction's contract; we wasn't to have anything to do with the excavating. Well, Mr. Macri said "The boys made a mistake; we will make them bigger."

Q. What did he say about the slope, if anything, of the banks?

(Testimony of William E. Schaefer.)

A. Well, he said they'd excavate them to slope so we could get the forms in and out, and my brother mentioned to him that it costs a lot of money to do that excavating, and it wasn't any part of our work, and he says "Why don't you take over the excavating, the fine grading?" and brother says "I don't want anything to do with it." He says "You take it and I'll pay for for it." Brother says "No, that's none of our work, and we don't want it; we've spent too much money on this now, trying to get started. [1174] If this keeps up, we'll tear these forms out, they'll have to go back to the shop and repair them, they'll wreck them when they take them out, where otherwise we could take these panels to another structure without hauling them to the yard and hauling them back." He says "Don't worry about that. I'll pay all your costs and expenses on that; just let's get started and quit arguing about it."

Q. Is that the substance of the conversation as you remember it? A. Yes.

Q. Now, about how many excavations, or structures, I should say, did you check?

A. At that time?

Q. Yes.

A. I believe three or four.

Q. This was on the 29th of April?

A. 29th of April.

Q. All right; now, did you find anybody doing any hand excavating in any of those structures?

Q. That same day, on structure number 18, next

(Testimony of William E. Schaefer.)

to the road, Fred Waltie and Bob Schuler were excavating, and M. C. Schaefer pulled them off the excavation. He says "We're doing too much of this now."

Q. Were any of Macri's men there doing any excavating? A. I didn't see any. [1175]

Mr. Holman: Pardon me; Mr. Waltie and who?

A. Bob Schuler.

Q. Whose employee was Bob Schuler?

A. They were Concrete Construction Company employees.

Q. Did Mr. Macri say anything to Mr. Schaefer that day in your presence as to the amount of money the Concrete Construction Company would make on this job?

A. Yes, he did. He made the remark that nobody ever lost any money——

Mr. Hawkins: Your Honor, I object to that, and I don't see the materiality of it; certainly not binding on the defendants Goerig and Philp.

Mr. Holman: It is immaterial as far as the Macris are concerned.

The Court: Overruled; you may answer.

Witness: He said nobody ever lost any money on Macri's job, and we wasn't either; that we should make between eleven and twelve thousand dollars on this job.

Q. All right; now, do you know how long you stayed on the job this time you came up on the 28th of April?

A. I believe I went back to Portland.

(Testimony of William E. Schaefer.)

Q. Beg your pardon?

A. I believe I went back to Portland.

Q. Yes, but how soon? That is, you came up on April 28, then met the next day, the 29th. Now, do you know how [1176] long you stayed there after that?

A. I don't exactly know how long I stayed there, whether I went back that same day or the next day.

Q. Do you remember whether or not you checked any more excavations while you were on the job that trip?

A. Not that trip.

Q. Pardon?

A. Not that day.

Q. Well, not that day; that trip did you?

A. I believe the next time I checked excavations was about May 6.

Q. About May 6?

A. Yes.

Q. Were you back on the job again then?

A. Yes.

Q. And as I say, Mr. Schaefer, if it is necessary for you to refer for dates to your book, why, feel free to do so. What did you do with reference to checking excavations on that trip, and what did you find out, and see?

The Court: I'm not sure of that date.

Q. He said about May 6.

A. About May 6.

Q. Still in 1944.

A. That day there was no excavations ready, that is, the fine grading hadn't been done in them, ready for forms; [1177] no lumber to build panels with.

Q. Now, did you say anything to anybody about the excavations?

(Testimony of William E. Schaefer.)

A. Every time I seen George Staples I complained about the excavations, and that goes for Mr. Macri; every time I seen Mr. Macri I complained.

Q. Did Mr. Staples or Mr. Macri ever tell you that you had to make your complaints in writing?

A. No, he never told me that.

Q. Now, when you complained to Mr. Staples on this May 6, do you remember anything about what he said about it?

A. He said he didn't have men enough and not the type of men for fine grading; should have an engineer to do this fine grading and take it over, because he was setting stakes out ahead of the hoe, to do the rough grading, and trying to take care of the fine graders too. He said it was too much, he couldn't take care of it.

Q. What did you say, if anything?

A. What's that?

Q. What did you say back to him, if anything?

A. I said it was about time they were getting somebody to take care of it. If we was going to go right through this job and get through with it in a few months, why, they'd have to get more fine grading ahead of us.

Q. Now, how about the next time? When were you back on the job? [1178] A. May 10.

Q. Did you again check the excavations?

A. Yes.

Q. How did you find them?

A. I had Fred Waltie check the structures, I believe from number 39 to 60, structure excavations.

(Testimony of William E. Schaefer.)

Q. How did you find them?

A. And that was the same day I took the pictures of these structures. The banks were vertical, the measurements showed there wasn't room enough for the forms without excavating from the bank to get in some of the forms, some of them were off center, not in line; I took the pictures and had them developed in Portland to show the office what was going on.

Q. Those are the pictures in evidence?

A. Yes, the pictures I identified.

Q. On this May 10, then—am I correct on that date?

A. Yes, you are.

Q. Did you complain to anybody, see Mr. Macri or his foreman, on that day?

A. I checked with Mr. Staples and told him what I was doing, told him I was taking pictures of them.

Q. And what was said between you and Mr. Staples, in substance, if you recall?

A. Well, he says, "Bill," he says, "I've seen you operate on [1179] other jobs," he says, "I hate to be holding you back like this," he says, "I know your outfit is a good operator, and I hate to be holding you back like this, but I can't get any cooperation with Macri."

Q. All right; now, when were you back on the job the next time?

A. That was on May 19.

Q. All right, who was with you on that day, if anybody?

A. I believe M. C. Schaefer.

Q. Now, what did you do and see that day?

(Testimony of William E. Schaefer.)

A. Pulled some of the men off and brought them back to Portland, on account of excavations.

Q. Did you examine the excavations?

A. Yes.

Q. And how did you find them?

A. The same as we checked them before; no improvement.

Q. And how many structure forms were then in place, if you know?

A. About 30 or 35, probably.

Q. Have you got a note that you made on it at the time?

A. No, I don't have a note on how many were ready.

Q. You do not have a note on how many was ready? A. No; I believe about 30 or 35.

Q. Do you know how many days' pouring, or how many days' pouring would that many structures be, assuming that you [1180] brought up the equipment then that you had on the job later, consisting of your Mixomobile, and your Buggymobile and your trucks?

A. Probably about 2½ days.

Q. All right; now, were there any more holes or excavations that were ready with reference to the hand excavation on the floor for the installation of structure forms, that didn't have the forms already in them, on May 19, 1944?

A. No; there were some dug out with the hoe.

Q. Dug out with the what? A. Hoe.

Q. Dug out with a hoe?

(Testimony of William E. Schaefer.)

A. A hoe that they use for rough excavation.

Q. Well, did that leave the floor of the excavations ready to receive the forms? A. No.

Q. All right, then, what did you and your brother, Mr. Schaefer, do that day? First, was Mr. Staples or Mr. Macri there?

A. I don't remember whether Mr. Macri was there, but we talked to Mr. Staples.

Q. What did you say to him?

A. We told him we was going to pull the men off.

Q. Tell him why? A. Yes. [1181]

Q. What did you say?

A. Told him we was going to pull the men off to Portland until they got some excavations far enough ahead so we could come in and really set forms.

Q. Did you do that? A. Yes.

Q. Leave any men on the job at all?

A. Yes.

Q. Who? A. The yard crew.

Q. And who was that?

A. I believe it was John Klug and Mercelle and Monrad. I'm not sure about Mercelle, whether we pulled him back to Portland or left him on the job.

Q. All right; then how long did you stay back in Portland before you came back on the job?

A. I believe the next time I was up there was the time the men went back on the job. That was June 29.

Q. Now, your brother, Mr. Schaefer, related a conversation which took place on June 15, 1944. I

(Testimony of William E. Schaefer.)

understand you were not present at that conversation. A. That meeting with Macri?

Q. Yes. A. No, sir, I was not.

Q. All right; you were back, you think, on—what was that [1182] date, you say?

A. June 29.

Q. Do you have any record or any recollection of what took place that day, Mr. Schaefer?

A. I believe we checked the structure excavations.

Q. Were there any excavations made then?

A. Yes, the fine graders had been in quite a few of the excavations. I don't know just how many, but there was quite a few of them.

Q. Did you put your carpenters back on the job then? A. Yes.

Q. And when they went to work what did they find, if anything, with reference to the grade and alignment of the excavations?

A. The invert elevation was too high, they had to start excavating, fine grading, and excavating the vertical walls to get in their forms, strongbacks and she-bolts.

Q. How about the bank slope? What did you find in that regard?

A. The bank slope was vertical.

Q. What did you do or say about it?

A. We complained to Mr. Staples about it, and Mr. Macri; every time we seen Mr. Macri we complained about it.

Q. What would you say?

(Testimony of William E. Schaefer.)

A. Well, there was one time, I don't know just exactly what [1183] date it was, he told me he was going to get another superintendent that knew something about the job; he didn't think that George Staples was capable of handling it.

Q. Do you know who was the superintendent—do you know when Mr. Staples left the job?

A. No, I don't.

Q. Now, do you know when you were back on the job the next time, Mr. Schaefer?

A. I believe we went to pour concrete. I'll check here.

Q. Do you have the date that was?

A. July 29 we moved on the job to pour concrete.

Q. And when did you make your first pour?

A. That was July 31.

Q. Now, do you have any notes that indicate the number of structures that were ready for concrete pouring when you started your crew, your pouring crew?

A. No, I don't have the number of structures.

Q. Now, how long were you on the job, then, when you came up this July 29?

A. I believe about 10 days, two weeks, somewhere along in there.

Q. What was done at that time, if anything, with reference to your superintendents?

A. During that time Fred Waltie asked to be relieved, and I [1184] put Darcy on as superintendent.

(Testimony of William E. Schaefer.)

Q. Was that—that was what you did?

A. That's what I did.

Q. Were you back on the job after this time, off and on? A. Yes.

Q. And what was the situation, without detailing each one from then on, with reference to the excavation and fine grading and bank slope?

A. Still the same; had to excavate all the way through, and fine grade; the banks were vertical all the way through.

Q. Did you complain to anybody of Mr. Macri's force about it when you were on the job the rest of the way through?

A. Every time I seen Mr. Macri I complained to him. In fact, I complained to him—he was telling my brother I was belly-aching too much.

Mr. Holman: I submit what he was telling his brother should be stricken.

The Court: It will be stricken.

Q. Did you hear Mr. Macri tell your brother that? A. Yes.

Mr. Holman: I don't move, then, but I don't think he finished the answer.

A. I heard Mr. Macri complain to my brother that I was belly-aching too much about these excavations. I was right there. [1185]

Q. Now, were you around when there was any of the stripping being done? A. Yes.

Q. And what difficulties, if any, did your stripping crew run up against in removing forms?

A. They had to excavate to get the she-bolts out,

(Testimony of William E. Schaefer.)

and pry the forms out, and they wrecked them; every panel I ever seen moved out, removed from the concrete structure that was down in an excavation, needed repair.

Q. That's the outside panels?

A. That's the outside panels.

Q. What, if anything, did the clearance or lack of clearance between the outside panel and the bank have to do with that?

A. Well, the strongbacks were right up against the dirt bank. They had to excavate to get down in there and remove the she-bolts and strongbacks.

Q. Now, with reference to the type of lumber that was furnished on the job, and the timeliness of furnishing it, could you describe that?

The Court: Perhaps we had better not go into that; it is almost time for recess. We will resume this case at 9:30 tomorrow morning.

(Whereupon, the Court took a recess in this cause until Thursday, March 6, 1947, at 9:30 o'clock a.m.) [1186]

The Court: I assume that this arrangement, whatever it may be, for taking a deposition, the Court is not required to take any action on that, but I just wondered when that would be?

Mr. Holman: Well, I set it for the 8th, Saturday the 8th.

Mr. Olson: Counsel has served a notice on us to be in Boise, Idaho, at 1:30 Saturday afternoon.

Mr. Holman: Served last Friday.

Mr. Olson: Yes, but I've been here the same as counsel has. It is rather irregular, it seems to me, to take a deposition right during the course of trial that far away from home, no showing what the witness will testify to or the materiality of his testimony. It seems to me it is unreasonable to require counsel during the trial of the case to make a trip of that kind without some showing of what the man will testify to, and that it's in some way material. All of the Bureau officials are here that actually did any of this, the field inspectors are all here, counsel has produced them, the office force is here, and this is the man in charge, to whom the people report. Unless they can show that he knows something the other men don't know and can testify to, it seems to me it is unreasonable to require us to go to Boise to take this man's deposition. The man's been there for a long time; his deposition could have been taken prior to trial.

Mr. Holman: Well, of course, on that, your Honor, I have already advised the court that I had made the arrangements for Mr. Nelson to be here, subject to the approval of his superior, and his superior sent the telegram [1187] as I showed the Court, stating that he would not be available, but we could take his deposition, and I will be glad to file that telegram if your Honor desires.

Mr. Olson: Well, I don't contend that Mr. Nelson would come here to the trial, because he advised me a couple of weeks ago that he wouldn't attend the trial. I'll concede that he won't come voluntarily.

The Court: I think it is conceded by both of you that Mr. Nelson wouldn't be available, is that true?

Mr. Holman: Not here, your Honor.

The Court: The requirements of the rule are that notice, a reasonable notice, be given of the time and place of taking an oral deposition, or deposition on oral examination. I suppose what would be reasonable would depend upon the circumstances of the situation. If this trial were continued straight on it certainly would be unreasonable to ask counsel engaged in it to go from adjournment one night to Boise on the next morning, 400 miles.

Mr. Holman: I didn't intend that. When we served it on the 28th the trial had already gone on so protracted that I thought the time—last Friday when I advised him——

The Court: Well, it is unusual in itself to take a deposition during the trial.

Mr. Holman: That is correct, your Honor, but I'm [1188] also in that emergency for which I am not to blame.

The Court: It seems to me under the circumstances it wouldn't be unreasonable to inquire as to what it is proposed to elicit from this witness, and whether it is not possible to get it from some other witness who is available.

Mr. Holman: I wish, as part of our case, your Honor, I've detailed this somewhat in the record before, but I wish as part of our case to have the engineer in charge present or his deposition taken for the purpose of showing the duties of the field men of the Bureau in connection with Macri's 13,

sub-numbers 13-a to 13-o, inspectors' reports, which are in evidence; with respect to whether the matter of the interpretation of the plans by the engineer in charge, your Honor will recall that the specifications say the engineer in charge, I think is the wording in the specification, or substantially that, contracting engineer, I think is the term——

The Court: Contracting officer?

Mr. Holman: Yes, thank you.

The Court: Was Mr. Nelson the contracting officer?

Mr. Holman: He was the contracting officer in charge; I wish to have Mr. Nelson also testify factually with respect to conversations had with Mr. Darcy with respect to the lack of progress of the Concrete Construction [1189] Company, by him as engineer communicated to Mr. Darcy. That information I cannot get from official records, and I wish also to have Mr. Nelson explain the manner of computation and the assignment by him for computation for payment of quantities; the explanation as to penalties, which is not yet before your Honor, since only the final estimates have been put in evidence yet, your Honor, but the determination of penalties invoked on both 1062 and 1068, and as the contracting officer he would be the one who would invoke those penalties, so he becomes a very important witness for Macri and Company, and I endeavored my best to comply with the rule; I endeavored first to have Mr. Nelson here. I went there before trial and talked with Mr. Nelson, and regardless of what counsel says, Mr. Nelson did not

give me any such statement that he would not be here, and he stated he would be here unless he 'phoned me or I heard from his superior, and I heard from his superior that he would not be here, and immediately communicated that to the Court, so it is not any hit and miss procedure or anything collateral. We are serious. I'm giving them plenty of notice, and they have not complied with the rules with respect to striking the deposition, unless your Honor holds it is not a reasonable time. If your Honor does, naturally I'll call the deposition off.

Mr. Olson: If your Honor please, there is in evidence, which we have permitted to go in, a letter from Mr. Nelson over his signature which gives his interpretation as to the one to one slope and the neat lines and the foot out from the foundation. That's in evidence. Maybe it wouldn't have been admissible, but I consented to it going in, so that letter is in. That would eliminate that part of it. Counsel says he wants to interrogate Mr. Nelson as to the specifications 1062, with reference to the interpretation by the contracting officer. I assume he is referring to that part of the specifications relating to the excavations where it says except in certain instances as laid out by the contracting officer as to progress, or something. If I understand counsel correctly, that's what he was referring to. It's been shown already that all of those provisions have no application in this case, because each and every structure was figured on a one to one slope and one foot out, by the actual man that figured the payment in his office. I've shown that those general specifi-

cations never came up on this project, because it was never shown that there was any of this vertical rock excavation, or that they run into excavations where they had to consult the contracting officer and vary the one to one slope and the one foot out for payment. Now, the matter of what directions Mr. Nelson gave the field men, or what their duties were, your Honor, is wholly immaterial in the first place, and in the second place the men themselves can testify and have testified to what their duties are. Now, what Mr. Nelson would say, and the only thing he could say, is what he might have told them, which is not controlling here. The question is what they did, and the field men themselves have all been here and testified to what they did. Mr. Nelson can't add a thing to that. The only thing that leaves is a conversation between Pat Darcy and Mr. Nelson. Well, the fact that he testified to a conversation that he had doesn't prove anything unless he's showing that Mr. Darcy admitted we were laying down on the job, and counsel hasn't said that's what he's going to show, and there is also in evidence, I believe, sure there is, from the Reclamation address to Macri and Company on that very subject, a letter, a copy of which was sent to the Concrete Construction Company as shown by the letter itself, and the letter is not complaining about the Concrete Construction Company being slow, but he's complaining about the job being slow. Your Honor, I don't see where the materiality of Mr. Nelson's testimony is shown, or what it will add to it, and I at this time move that the notice for taking the deposition be stricken on

the ground that it is not reasonable notice given us, and on the [1192] further ground that it is not shown Mr. Nelson is a material witness.

Mr. Holman: May I state this? I don't, your Honor, I don't want to extend it at all. The Court will recall that on the second day of the trial, with your Honor's permission and counsel's acquiescence, I called in the various government men for the purpose of their preliminary identification of the various government records, and some of those are now in evidence, to be substituted by copies. Others have not been. I called in the officer in charge, Mr. Harold Pease, for that general identification, and that was done with the purpose that Mr. Nelson then would have those here for the purpose of his explanations to the Court with respect to using them, as the chief officer on this work, as part of the defendants' case. Now, there is one angle to this, your Honor, that counsel has not mentioned, with respect to 1068 and also with respect to 1062, as to the relationships between the principal contractor and the government and communications between them. The defendant Macri is entitled both as against their claim for breach of contract and as affecting Philp and Goerig to have explanations by that commanding officer—not commanding officer, officer in charge, surrounding those communications.

The Court: It seems to me that your position would be better as to whether or not you had given reasonable notice if you had taken the Court into your confidence and had taken up this matter of taking the deposition on next Saturday. I didn't

know until I learned it rather inadvertently that you had given oral notice of taking the deposition.

Mr. Holman: I gave no oral notice; I gave written notice.

The Court: Yes, I mis-spoke. I meant that you gave written notice of taking the oral examination.

Mr. Holman: Yes, and I immediately communicated with the Clerk, and was advised to keep that.

The Court: That's the last I heard of it, until a day or two ago.

Mr. Holman: I understood from your Honor that it wasn't reported to your Honor, and was to be proceeded under the rules. If your Honor feels I should have communicated with you, I'll call the deposition off, and there was no intention to keep anything from the Court. I understood it was to be a matter between me and the Clerk.

The Court: What I had in mind was that if you wanted me to pass upon the reasonableness of your notice, and of course the rule provides the notice must be reasonable, I would be in a better position to do it. If I [1194] hadn't adopted the plan of letting the people in this next case come in, we would be running this case right up to Friday afternoon, and then it would be utterly impossible or impractical to go to Boise.

Mr. Holman: It certainly was a matter that we would not pursue. I would have had to make a rearrangement. Your Honor will recall I immediately called it to your attention by that telegram, and I have tried my level best to do exactly the proper

thing under the existing circumstances. If your Honor feels I should have notified you instead of the Clerk with respect to the notice served, I right now in open court waive the deposition, your Honor.

The Court: The thing I want to do here is to get all the pertinent evidence that I can that might be of aid in deciding the issues in this case. However, I don't want to be unfair to either litigant in the matter of taking depositions a long distance. I think if you want to take your deposition on Saturday we'll not hold Court on Friday in this case. Can you take it in one day?

Mr. Holman: Oh, I think so. Counsel and I have had experience before. It worked reasonably well.

The Court: It seems to me your deposition took a good many days before. [1195]

Mr. Olson: It went pretty slow, your Honor. There wasn't anybody there to rule on objections. We got through, but it was so late our car was locked in. We have to get back from Boise, Idaho, too.

The Court: It's about 400 miles, isn't it?

Mr. Olson: That's what I understand, and I've made some inquiry as to the mode of getting there, and apparently it is not good. If you go to the Union Pacific you take some—I've forgotten what they call it, from here to Wallula, and maybe you make connections to get to Boise on the Union Pacific and maybe you don't. It just doesn't seem to me that it is reasonable to require us to do this. They've got an engineer in charge right here, right worked on the job were available.

The Court: Well, this man Nelson is the engineer who was in charge at the time these contracts were executed, isn't that true?

Mr. Holman: That's correct, your Honor, and may I say this, may it please the Court, that I would prefer not to take the deposition than to have your Honor feel that I was taking the least advantage of any counsel in the case, or of the situation. I'll take my chance without the deposition before I have your Honor feel that way. [1196]

The Court: I didn't intimate you were taking advantage, Mr. Holman. I know you didn't get word that the witness wouldn't be available until the trial started.

Mr. Holman: I'm just in a tough spot, and trying to do my best.

The Court: I think, however, if you wish to take the deposition you should pay counsel's expense down there and back, as a condition to taking it.

Mr. Holman: That is, the plaintiff's counsel?

The Court: Yes, I mean plaintiff's counsel.

Mr. Holman: I'll furnish his transportation.

The Court: I think that those terms are not unreasonable.

Mr. Holman: You say his expenses, your Honor. You mean transportation, subsistence, hotel, or his transportation?

The Court: I mean his transportation and subsistence while he was there, at, shall we say, the Federal rate?

Mr. Holman: No, I don't insist on the Federal rate. I'll leave it to counsel's mercy.

The Court: I think you gentlemen can get together as to what his actual expenses are. That's what I had in mind. I think that is a reasonable condition to make, if you wish to take a deposition at this time, in the middle [1197] of the trial, and that means his actual expenses on the train and his subsistence while he is there. What time did you set it?

Mr. Holman: I set it, your Honor, knowing the difficulty of travel from Yakima to Boise, I set it for 1:30 Saturday, the 8th, which will allow counsel and me to go by train on the evening of the 7th, Friday the 7th, or earlier if counsel wishes to travel more leisurely, and will allow a return by train on Sunday, the 9th, unless we could get through. The train leaves there at 3:30 in the afternoon, so it is unreasonable to expect to get back on that train.

The Court: That doesn't leave you very much time to take the deposition. Of course, you could go, I presume, until you finish on Saturday night.

Mr. Holman: And it is set at the Bureau office, which is some three miles out, so counsel will have a taxi fare.

Mr. Olson: How are we going to get back here by Monday morning? I know, I did find out this, that you get up off of your sleeper down here at Wallula I think at 2:30 in the morning.

Mr. Holman: 4 o'clock.

Mr. Olson: They told me 2:30, and then you sit up.

Mr. Holman: It is not pleasant, it is not comfortable, [1198] and I know, because I just took it.

The Court: Well, I wonder if it wouldn't be advisable, then, I hadn't intended to have any hearing in this case on Friday anyway, that's day after tomorrow, isn't it——

Mr. Holman: I don't know whether I could advance the hearing to Friday. I had the arrangements made for Saturday. I don't know whether I could get the Court reporter and notary public for Friday.

The Court: Well, that might be difficult. I wonder if it wouldn't be wise to not reconvene this case until Tuesday morning?

Mr. Holman: I think that would be very much better.

Mr. Hawkins: That's agreeable. I wonder if it might be understood——

The Court: Just a moment.

Mr. Olson: That's a little bit difficult. I've had this difficulty throughout the trial, as your Honor knows; I've been having witnesses here, I got two men off the job yesterday afternoon, thinking it was a cinch to go on. Frankly, I'm getting quite close to the end of my case. I do have some expert witnesses, one from Portland, who is here now.

The Court: Well, we have tomorrow forenoon, of course, in this case, a two and a half hour session. You [1199] have one witness in addition to finishing with William Schaefer, is that what you meant?

Mr. Olson: Well, I have Mr. William Schaefer to finish with, and then I have this expert witness, which will take some time, and our accountant, of course, and then Mr. Schaefer, M. C., on the question of damages.

The Court: Well, we'll have tomorrow forenoon, two and a half hours, and——

Mr. Olson: Well, I'd rather, your Honor, start in Monday morning. Perhaps we can get a ride on an airplane back, or something.

The Court: Well, we'll start at 10 o'clock Monday morning, then, anyway, and give you a half an hour more.

Mr. Hawkins: Your Honor, I wonder if we might have the understanding, I'm not planning to go to Idaho on this deposition, that any questions asked there are subject to objection when the deposition returns here?

Mr. Holman: I think that would be only fair, your Honor.

The Court: I think that perhaps the deposition should be subject to objection, with the exception I don't think we should apply objections too closely to the form, or whether it is leading, but as to materiality I think they would be subject to objection.

Mr. Hawkins: Pursuant to our previous understanding, [1200] I wonder if I might withdraw this file of DePuis and Ferguson? It's been in the hands of the clerk four or five days, a copy of the file is in the clerk's hands——

Mr. Holman: Is the copy of the assignment yet delivered?

Mr. Hawkins: Yes, the copy of the assignment is in the hands of the Clerk. That's no part of this file at all. This is the claim of Maceri and Company against the government, and a true copy of that claim is also in the hands of the clerk.

Mr. Olson: I understand, counsel, that you have substituted a complete copy of all the documents that are in this file, that you wish to withdraw?

The Court: What you had in the first place were copies, and you've substituted copies for the file; is there any objection?

Mr. Holman: No, your Honor. That was the understanding.

The Court: All right, it may be taken out. The court will recess in this case until tomorrow morning at 9:30.

(Whereupon, the Court took a recess in this cause until Thursday, March 6, 1947, at 9:30 o'clock a.m.) [1201]

Yakima, Washington Thursday, March 6, 1947

9:30 o'Clock A.M.

(All parties present as before, and the trial was resumed.) [1202]

WILLIAM E. SCHAEFER

Direct Examination

(Continued)

By Mr. Olson:

(Whereupon, the reporter read the last question on March 5, as follows: "Now, with reference to the type of lumber that was furnished on the job, and the timeliness of furnishing it, could you describe that?")

Q. All right, will you answer that question, Mr. Schaefer?

(Testimony of William E. Schaefer.)

A. I did see one pile there of second-hand lumber, about the time we come back to set structures, I know.

Q. Speak up a little louder.

A. I did see a pile of second-hand lumber at the yard the time we was back to set structures again; that's after we pulled off of the job.

Q. Have you examined the lumber we have in court here, which is plaintiff's Exhibit 29?

A. Yes.

Q. Is that the type of lumber that you refer as the second-hand lumber that you saw?

A. Yes, that's part of the pile I saw.

Q. And how does this lumber here compare with the general run of the load or pile of second-hand lumber that you saw? [1203]

A. From what I seen there, that there is an average, I would say it was a fair average of the pile.

Q. Now, did you see any other lumber other than this pile that you can describe, as to quality?

A. At different times I seen lumber that was considerable better than that.

Q. And was the rest of the lumber that you saw, outside of this pile, suitable and adaptable to the job, or what was its condition?

A. It wasn't suitable.

Q. And in what respect?

A. It was too wet, and a lot of it was knotty, large knots in it; some of it was kind of cracked up, after it laid on the pile the sun dried it out. It was warped and cracked.

(Testimony of William E. Schaefer.)

Q. It was warped, you say.

A. Warped and cracked.

Q. Now, what did you have to do, if anything, about the knot holes?

A. Patch them up with tin.

Q. Why was it necessary to do that?

A. In order to have enough lumber to keep going.

Q. Now, with reference to whether or not the lumber—that is, whether or not the lumber was available as you needed it, will you describe what the situation was in that [1204] regard?

A. Our superintendent kept complaining to the office——

Mr. Holman: I submit that this is hearsay.

The Court: Yes, that will be stricken, what the superintendent said, unless it was in your presence or the presence of the defendant, one of them.

Q. My question first was what was the situation with reference to the lumber being available as needed, as to what you know of your own knowledge?

A. It wasn't available, that is, on the job at all times.

Q. Now, did you hear any complaints made by your superintendent to Mr. Macri or to Mr. Macri's superintendent concerning the shortage of lumber?

A. Yes.

Q. And state the nature?

Mr. Holman: Just a minute. Your Honor, I would like to know when and where and in whose presence.

(Testimony of William E. Schaefer.)

The Court: As nearly as you can fix them. I think that is reasonable.

Q. Can you fix any times, Mr. Schaefer, or not?

A. Well, I was on the job on and off, but I was there an evening when our superintendent complained to Macri's superintendent about getting lumber in——

Mr. Holman: Which superintendent?

A. Macri's superintendent. [1205]

Mr. Holman: Which one?

A. Macri, or Ashley; I believe I heard him complain to both of them.

Mr. Holman: Was it Ashley?

A. I believe it was.

The Court: Go ahead with the examination.

Q. Now, do you know, Mr. Schaefer, whether or not the lumber would be furnished promptly after the complaint was put in? Do you know, other than what somebody may have told you?

A. Only from what our superintendent told me.

Q. Beg pardon?

A. Just from what our superintendent told me.

Q. All right. Now, there's been some pictures introduced of the Mixomobile, showing the elevated tower, Mr. Schaefer. Do you know about the removal of that tower? A. Yes.

Q. And can you tell about how soon after the job started that the tower was removed?

A. We started to pour the 29th of July, I believe, and the tower was removed the 16th day of August.

(Testimony of William E. Schaefer.)

Q. Now, Mr. Schaefer, showing you pictures 35 and 36 of plaintiff's Exhibit 49, and drawing your attention to the long chute that is shown in the picture, state what is the situation with reference to whether or not the length [1206] of that chute is adjustable? A. Yes, it is.

Q. And can you describe somewhat to the court just how that operates?

A. I believe the main part of the chute, I ordered it and had it made to my specifications, was about 10 feet long, with two 30 inch extensions, so that you could adjust it at the structure, pour in one side of the structure, or raise up your hopper and pour in the other side, so you would have different various lengths to work from.

Q. Can you state the limits of adjustment of that chute, then?

A. It would be about 5 foot adjustment.

Q. Was there any other adjustment on that chute, a slide adjustment of any kind?

A. This chute here, I think the joints broke, the adjustments.

Mr. Holman: May I have that answer, please?

(Whereupon, the reporter read the last previous answer.)

Q. Now, Mr. Schaefer, when the contract was entered into on 1062 between Mr. Macri and Schaefer, referring to the sub-contract, was there any conversation in your presence as to, or at about that time, in which Mr. Macri made any statements

(Testimony of William E. Schaefer.)

about the availability of lumber, or [1207] his ability to furnish lumber, that you heard? A. Yes.

Q. And would you relate the conversation and state for Mr. Holman's benefit the approximate time and as near as you can who was there?

Mr. Holman: That's right, I'm entitled to that.

A. I don't know the exact date, but I would say it was around March 8, or 9, along in there.

Q. Now, about who was there, Mr. Schaefer?

A. Mr. Macri, M. C. Schaefer, and myself.

Q. Now, would you state what Mr. Macri said, if anything, about his ability to furnish lumber, both as to quality and timeliness, for this job?

A. He said that he had an interest in a lumber mill, and that he'd furnish the lumber, and as far as lumber, we wouldn't have to worry about it, he'd get plenty of it.

Q. Now, did Mr. Macri make any statements in your presence as to the length of time within which you would be able to complete this job, as far as their operations were concerned?

A. Yes, that was discussed that time.

Q. And about when?

A. About March 8 or 9.

Q. Is that the same time as the lumber?

A. Same time. [1208]

Q. Same persons present? A. Yes.

Q. And what did he say in that regard?

A. Well, he says that he had plenty of equipment to keep ahead of us. M. C. Schaefer asked him about when he expected to get through with

(Testimony of William E. Schaefer.)

that. Well, he says "We can work ahead of you as fast as you want" and he says "If one shovel ain't enough, we'll put on another one." He says "In fact, if you fellows need some equipment, we can let you have some; we've got plenty of equipment."

Q. Was anything said by Mr. Macri in your presence about the availability or roads?

A. Yes.

Q. And can you state about when that was?

A. That was the—I believe it was about the latter part of March.

Q. In whose presence?

A. Mr. Nelson, of the Bureau of Reclamation.

Mr. Holman: 1944?

A. 1944.

Q. In whose presence, Mr. Schaefer?

A. Mr. Nelson, of the Bureau of Reclamation.

Q. Who else?

A. M. C. Schaefer, and myself, and Mr. Macri.

Q. And what did Mr. Macri state? [1209]

A. I asked him about the roads. It was at the time we was looking at 1068. We went down through the project, and coming back I asked Mr. Macri about these roads. I said "What are we going to do about them, to get in the field, pretty bad down here." He says "That will be the same as the other job. We've got to get in here to do our work, and we'll see that you fellows can get in to them."

Q. Now, in these other jobs, or in the work

(Testimony of William E. Schaefer.)

which the Concrete Construction Company had been doing, Mr. Schaefer, particularly its concrete work, was there any concrete work on these other jobs a part of which was similar to the structure or box type of concrete work that you were performing on 1062? A. Yes, somewhat similar.

Q. In what regard, and what parts of it?

A. Well, it was manholes, catch basins, inlets, on airport work, and then there was pump houses at Sauvie's Island there in Portland.

Mr. Holman: Your Honor, the witness just doesn't talk loud enough for us to hear him.

A. Manholes, catch basins, inlets, on airport work; pump houses, pumping stations at Sauvie's Island, Portland.

Q. Now, was that work that you just described done before or after this job?

A. Previous to this job. [1210]

Q. Previous to 1062?

A. That is, some of it, and some of it during this job.

Q. Now, while you were performing this 1062, was there ever anything said about getting started on 1068, in your presence or by you?

A. Not to me.

Q. Did you say anything to Mr. Maceri about it, or his superintendents make any inquiry about it?

A. No, I didn't, myself.

Mr. Olson: You may examine.

(Testimony of William E. Schaefer.)

Cross-Examination

By Mr. Holman:

Q. Mr. Schaefer, you were general superintendent of all of the Concrete Construction Company operations? A. Yes, sir.

Q. And you had general charge of their over-all operations? A. Yes.

Q. Now, in those operations, 1062 along with these other things that you detailed at the last of your direct testimony were under your supervision, right? A. Yes.

Q. And was your salary apportioned to the various jobs consistent with the amounts of time you spent on those jobs?

A. My salary is by the week.

Q. Yes; was it apportioned to the jobs? [1211]

A. That segregation was made in the office, and how they made it, I don't know.

Q. What was your salary per week?

A. \$100.00 per week.

Q. \$100.00 a week. Now, isn't it a fact that after, as you say, you pulled your crew off, you put yourself on salary for this job at \$100.00 a week, correct? A. I didn't put myself on there.

Q. You were put on there, were you not, sir?

A. Sir?

Q. You were put on, were you not, at \$100.00 a week? A. I was put on.

Mr. Olson: Put on what?

Mr. Holman: On this job.

Mr. Olson: When?

(Testimony of William E. Schaefer.)

Mr. Holman: I've just asked him, after he pulled his crew off.

The Court: Well, proceed with the examination.

Cross-Examination

(Continued)

By Mr. Holman:

Q. I'll ask you if it is not a fact that for the week of July 27 to August 3, 1944, you were put on as superintendent at \$100.00?

A. I don't remember when that——

Q. And for the week August 3, to August 9 at \$100.00; correct or not? [1212]

A. I was getting a \$100.00 a week.

Q. Then the following week, August 10 to August 16, you were not on the payroll. Why?

A. I don't know why they didn't put me on the payroll.

Q. It is a fact, is it not, that you as general superintendent of all of the Schaefer operations was the superior to all of the different job managers? A. Yes.

Q. Yes; and you were the one who selected or designated the job managers, were you not?

A. Between M. C. Schaefer and myself.

Q. Yes, but you were the operating head, weren't you? A. Yes.

Q. Field head, I mean.

A. I consulted M. C. Schaefer.

Q. And you selected the men that you thought were the right men? A. That's right.

(Testimony of William E. Schaefer.)

Q. Now, I'm going to ask you with reference to the certified payroll deposited here by the government, as Macri's identification 16, will you please refer to the week of July 20 to the 26th; strike that—when did you say your crew came back on? A. To set forms?

Q. Yes, sir; came back on the job after you pulled it off? [1213]

Q. I believe it was May 29. I'll check that.

Q. All right, sir, will you refer to the week of May 25 to May 31—I mean in the payroll; you need your book?

A. I'm checking my date on when they came back on the job.

Q. I see; pardon me.

A. That was June 29.

Q. Yes, sir; June what? A. 29th.

Q. Yes, sir. Now, that was the time that you had your crew come back to go to work, correct?

A. That's right.

Q. Will you refer to the week of June 29 to July 5, which includes the holiday, July 4, and tell me if you appear there as superintendent, or if there is any superintendent shown? You're familiar with those payrolls, aren't you, Mr. Schaefer?

A. I haven't seen these payrolls much outside of just taking a glance at them. Don't they run in sequence here?

A. Yes, they're supposed to run right straight on down from the start; the week of June 29, July 5.

(Testimony of William E. Schaefer.)

Mr. Olson: Your Honor, it doesn't appear to me that it is proper to cross-examine this witness as to a payroll that he had nothing to do with making out, not made under his supervision, not gone into on direct examination; it is obviously a situation of Mr. Schaefer [1214] going through the payroll and telling counsel something that he knows nothing about.

Mr. Holman: That's not my purpose.

The Court: What is your purpose?

Mr. Holman: My purpose is examining his part of the participation in this job.

The Court: But he had nothing to do with the making of this payroll.

Mr. Holman: I don't know why not, sir; he's general superintendent.

The Court: Isn't this Macri's payroll?

Mr. Holman: No, sir, it is Schaefer's payroll.

Witness: I don't make out the payroll.

Q. It is made out under your direction, isn't it?

A. No, sir.

Q. Whose direction is it made out under?

A. M. C. Schaefer, and the bookkeeper. I don't keep any books there.

The Court: I think you might take this payroll here and ask him about definite items.

Mr. Holman: Your Honor, I'm astounded that he can't pick it up. Let me have it.

The Court: We've spent altogether too much time in this trial fumbling around documents and exhibits anyway, it seems to me. [1215]

(Testimony of William E. Schaefer.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. The week ending July 5 on that payroll you do not appear, do you? It shows Fred Waltie, John Klugg, Darcy, Monrad and Mercille, correct?

A. Did you ask me if there was a superintendent appeared on this job?

Q. I asked first if you appeared.

A. I did not.

Q. And is there a superintendent shown?

A. Fred Waltie.

Q. Will you look at it, please? Isn't that carpenter foreman?

A. That's what it says on the payroll. He's still my superintendent on that job.

Q. He's certified to the government as a carpenter foreman, isn't he?

A. I can't help that. He was my superintendent on the job.

The Court: It seems to me that this examination should be, if you want to refer to something in here, then ask him if that is or is not a fact, according to his recollection.

Mr. Holman: That's right, sir.

The Court: It doesn't seem to me it is proper to have him tell you some part of something that is not in evidence, that he has nothing to do with making, and knows [1216] nothing about.

Mr. Holman: The point right there is that the

(Testimony of William E. Schaefer.)

payroll indicates Waltie as carpenter foreman, to the government, and he says and they've said that he was the superintendent.

The Court: I still don't see how it is proper, if he had nothing to do with making the payroll. Is this their payroll?

Mr. Holman: Yes, your Honor, Exhibit 16 is a certified transcript of payroll.

The Court: Which Schaefer furnished to Macri?

Mr. Holman: No, which Schaefer furnished to the government. This is the government's certified copy.

The Court: Well, go ahead.

Cross-Examination
(Continued)

By Mr. Holman:

Q. Then for the next week of July 12—I'll be very brief on this, your Honor—the same general crew, and you were not there? There was a crew of seven at that time, was there not? A. Yes.

Q. All right, sir; then will you take the following week of July 19, and it is the same, is it not, sir? A. There's eight there.

Q. But you're not there? A. That's right.

Q. And there is no superintendent indicated. For the week of July 20 to July 26 that is the same, is it not, but you had twelve men that time, did you not? A. Yes.

Q. All right, sir. Then for the week of July 27 you are listed, are you not? A. Right here.

(Testimony of William E. Schaefer.)

Q. Yes, sir, as superintendent at \$100.00 a week, correct? A. That's right.

Q. All right, sir; now, the next week, for the week of August 9, ending August 9, you're again listed at \$100.00 a week, are you not, as superintendent? A. That's right.

Q. Yes, sir; then for the next week, the week of August 16, you're not listed, are you?

A. Yes, sir.

Q. Where?

A. Right down here, at \$100.00.

Q. All right, \$100.00 there. Thank you. Then the week of August 23 are you listed?

A. Yes, sir.

Q. All right, \$100.00? A. Yes, sir.

Q. All right, sir; and then the week of August 30 you're listed at \$100.00, are you not, sir? [1218]

A. Yes, sir.

Q. All right. Now, we'll get to the next one, September 6, you are not listed, are you, sir?

A. No.

Q. All right; now, for the week of August 16, and back to the last part of July, your crews had swelled from about 12 to 21, hadn't they, about 20 or 21? A. Yes, sir.

Q. Now, will you take the next week, please, still a large crew, Mr. Schaefer, the week of September 13, you're not listed, are you, sir?

A. No, sir.

Q. And isn't it a fact that after that you were not listed as superintendent on this job?

(Testimony of William E. Schaefer.)

A. Only when I was on the job, I imagine. I was on and off the job, sometimes for two or three days. How they segregated my time I don't know.

Q. Now, until July 4 Mr. Darcy had been operating under you in the Portland area? A. Yes.

Q. And you sent him up then to replace Waltie, did you not?

A. That was before July 4 that he took Waltie's place.

Q. Yes, June 29 to July 5, that week.

A. I think that was June 10, 9th or 10th; I can find out right here. [1219]

Q. Right here in the payroll you see both Mr. Waltie on for part of the week, don't you, and Mr. Darcy on for the rest of the week, the week of July 5? A. I see that.

Q. And you see it is sworn to as correct, do you not?

A. That doesn't indicate that the change was made at that date.

Q. All right, sir.

A. It may be right; I'll look in my notes.

Q. There is the week ahead, Mr. Schaefer, if you want to look at it. No Darcy.

A. About August 10.

Q. Sir? A. About August 10.

Q. That Darcy went on? A. Yes.

Q. Well, then, please, will you explain how, if he went on the job on August 10, how he's on the payroll for the week ending July 5? He's there, isn't he, P. L. Darcy? A. Uh.huh.

(Testimony of William E. Schaefer.)

Q. And he's shown three days, isn't he? Two days on the job and then three days off and one day on? A. Yes.

Q. All right, sir, and the next week he's shown, is he not? A. Uh huh. [1220]

Q. For the full week? A. Yes.

Q. And then still in July he's shown, is he not, for the next week, the full week?

A. Yes; so was Waltie.

Q. Yes, sir; I'm talking about Darcy, now. You say August when, was when he went off?

A. Right around August 10.

Q. And then the week of August 2 is the same, they're both there? A. Uh huh.

Q. And the week of August 9 is the end of Waltie's time, is it not? No, it doesn't show there.

The Court: I think you had better speak up, Mr. Holman.

Q. The week of August 16 shows Mr. Waltie still there, does it not, sir, as carpenter foreman?

A. Yes.

Q. Top man, first man? A. Yes.

Q. Wages fixed at the top; now, the week of August 23 shows Mr. Darcy replacing Mr. Waltie, does it not? A. Yes.

Q. Now, what is your explanation for your going on the payroll as superintendent, if you say Darcy was superintendent? [1221] Why was this payroll carried double that way, if there were two superintendents?

A. Darcy is superintendent, and I'm general superintendent.

(Testimony of William E. Schaefer.)

Q. Yes, sir; but didn't you in detailing your direct examination, Mr. Schaefer, endeavor to the best of your ability to set forth the times that you visited the job to indicate to counsel the times that you stayed on the job for any period, correct?

A. In my note-book——

Q. Yes, sir; and the time you indicated there as staying for several days was April 15, 1944, was it not, sir? A. April 15.

Q. Yes, sir; that's when you told counsel you were there for several days, and then—have you got that yet, sir?

A. Yes, that's correct.

Q. You were there for several days but you're not on the payroll for several days at that time, are you, sir?

A. I believe that's what we looked at there.

Q. In April?

A. I don't know whether I'm on the payroll for that day or not, because I didn't make it out.

Q. All right; now, the next time you answered counsel that you were on for several days; you said about 10 days or two weeks, was July 29, 1944?

A. Correct, yes, sir. [1222]

Q. And at the time you answered counsel you knew you were on that payroll at that rate for that period, did you not, sir? A. Yes.

Q. I see. Now, is it or is it not a fact that you sent Darcy up there, Mr. Darcy up there, to pre-gauge this job for a report to you?

(Testimony of William E. Schaefer.)

A. He sent his reports, his daily reports, into the office. I looked at them.

Q. While Waltie was there?

A. After Darcy took over.

Q. Sir?

A. After Darcy took over he made them out.

Q. I'm talking from June up to the time Darcy took over in August; Darcy didn't put reports in, did he?

A. No, Waltie reported to the office, with a daily report, every day.

Q. Then the reason that you put Darcy on was that he was a Portland man and you had gone over this job with him before he came up?

A. I didn't.

Q. You had not, sir? A. No.

Q. You told your counsel, according to my notes, Mr. Schaefer, that when you were up on that job, this is what my notes [1223] show you say: "They wrecked every panel I seen removed, every outside panel needed repair, strongbacks right up against the bank, had to be excavated to remove them and the she-bolts"; do you remember that testimony?

A. Yes, I do.

Q. How many panels did you see removed?

A. I seen panels removed on different occasions there.

Q. Well, give me the laterals, will you?

A. How many panels or structures?

Q. No, on what laterals?

A. On laterals 59.3.

(Testimony of William E. Schaefer.)

Q. What structures did you see panels removed?

Mr. Olson: If you can say.

Q. Oh, just a minute, counsel.

A. I believe between 1 and 18.

Q. Between 1 and 18? And when?

A. I don't remember the date.

Q. Well, what month?

A. I didn't mark it down when they stripped that.

Q. You can't tell me whether it was August, September, October, or November?

A. No, I can't tell you the date.

Q. Sir? A. I don't know the date.

Q. Or was it during the freezing weather? Were you up there [1224] during the freezing weather?

A. No, I wasn't.

Q. You didn't go up at all during the freezing weather?

A. I didn't, but M. C. Schaefer did.

Q. I'm asking you, sir. A. No.

Q. You didn't go there during the cold weather at all? A. No, I didn't.

Q. Were you apprised of the fact that the cement had to be heated, government requirement that the cement be heated from inside the forms after it was poured?

A. I don't believe we heated any concrete up there.

Q. You don't think you did, sir?

A. No.

Q. Would you say positively you didn't, sir?

(Testimony of William E. Schaefer.)

A. Outside of being a flare on the outside of the structure.

Q. That's just what I asked you.

A. I knew they did that.

Q. And you saw them do that? A. No.

Q. You never saw that. Did you help remove the form yourself? A. I watched them.

Q. You didn't help? A. No. [1225]

Q. All right, sir. Can you tell me anything about the sides of the forms, whether they were clean or not, the forms that were removed, the outside forms; were they clean, or not?

A. Fairly clean.

Q. And were they aged and warped and weather-affected, or not?

A. Some of these forms were, and they had small strips in the cracks.

Q. Isn't it a fact, Mr. Schaefer, to your definite knowledge, that those forms had been in for months and months and months before concrete was poured?

A. I know they were in for quite a long time, but I didn't know they were in that many months; months and months and months; I didn't know they were in that long.

Q. Mr. Schaefer, you as the general superintendent had charge, did you not, of lining out this job from the sub-contractor's viewpoint?

A. My duty was to see that the superintendents had plans, equipment, and also try, and I did, secure man power for them.

(Testimony of William E. Schaefer.)

Q. Yes. Now, I move that be stricken, your Honor. That isn't what I asked you; what I asked you is if you had charge of lining out the job.

The Court: Well, I don't know just what lining out [1226] means. I don't know whether his answer is responsive or not.

Q. Do you know what I mean by "lining out" a job? A. I know exactly what I did.

Q. What does that mean?

A. That means line your superintendents out to that respective job.

Q. It means plan your job? A. Yes.

Q. Mr. Schaefer, you personally made out no requisitions for lumber? A. No.

Q. You personally figured no quantity of lumber required for performance of the sub-contract?

A. No.

Q. You personally made no designation as to quality of lumber to be performed for the sub-contract? A. No.

Q. You were in touch at that time, were you not, with the coast, the national, and the state conditions with respect to lumber?

Mr. Olson: Objected to as being wholly immaterial, if the Court please. Macri undertook to furnish the lumber for this job.

Mr. Holman: May it please the Court, that may all [1227] be, but if all parties concerned know conditions as they are, then we're talking with respect to conditions as they are, not with respect to conditions as we would like to have them.

(Testimony of William E. Schaefer.)

The Court: I don't know what effect the shortage of lumber might have. I'll let you pursue the inquiry. A. I knew the conditions.

Q. Sir? A. I did.

Q. And you had the other operations, so you felt the shortage on those? A. I did.

Q. You knew, did you not, that the government itself, even this Bureau, had withdrawn all of its specifications with respect to quality and dry content of lumber; you knew that, did you not, sir?

A. I did not.

Q. You did not? A. No.

Q. Now, isn't it a fact that Mr. Macri told you respecting lumber in substance this: That he, with Mr. Philp and Mr. Goerig, and I don't know whether he mentioned them to you or not, but he was in the operation of a housing project in the Seattle area?

A. Yes, he mentioned that fact? [1228]

Q. And that he had a priority for securing lumber for that, and he had a priority for securing lumber here, correct? A. That's right.

Q. Yes, and didn't he tell you this, in substance, that in case of emergency he could take from the housing project lumber temporarily for this, so that there wouldn't be any break in there, didn't he tell you that? A. Yes, he did.

Q. Yes, and further, didn't he tell you this, in substance, sir, not that he had an interest in a sawmill, but that he had made a payment of approx-

(Testimony of William E. Schaefer.)

imately ten thousand dollars to a sawmill to be sure to have that lumber; isn't that what he told you?

A. He told me he had an interest in a sawmill.

Q. Yes, sir, and didn't he tell you how it was, that very thing? A. I do not remember that.

Q. You do not remember that Mr. Macri told you he had made a very substantial payment on lumber so he could have it?

A. I don't remember that. He might have told me.

Q. You mean to tell me Mr. Macri had an interest in a sawmill? A. Yes, he did.

Q. Did he say where it was? A. No.

Q. Did you inquire?

A. No, I didn't. That was good enough for me, if he had an interest in a sawmill.

Q. And you didn't ask him where the sawmill was? A. No, I didn't.

Q. And he didn't tell you about making a substantial payment for the lumber for this housing project, and for this project?

A. Not that I can recall.

Q. You say you saw a pile of second-hand lumber? A. That's right.

Q. Can you give me the dimensions of it?

A. It was ship-lap.

Q. Quantity? A. 1 by 8 ship-lap.

Q. Yes; quantity?

A. I'd say there was approximately, I didn't tally it, but just looking at the pile I'd say there was maybe three or four hundred board feet.

(Testimony of William E. Schaefer.)

Q. All right; three or four hundred board feet; that would be about how many boards of ship-lap?

A. Well, it was in various lengths. All I went by is what I seen from the different times that I've seen it on piles and it was tallied, and it would make about three or four hundred board feet. I didn't tally it. [1230]

Q. Now, that lumber itself, that amount of lumber, second-hand lumber, that you saw, you say you saw——

A. Yes.

Q. ——would accommodate about how many structures?

A. I've never taken off the quantity of lumber on structures.

Q. You never have determined the quantity of lumber on structures?

A. No.

Q. And you didn't for this job?

A. No, I didn't.

Q. All right, sir; and are you able now to designate what would be computed to determine the board feet for a structure?

A. I could, but it would take me quite a little while to do it.

Q. I see; you haven't done it, sir? You have not done it?

A. Not on structures.

Q. I see. Can you please tell me what evening you say your superintendent in your presence complained to Macri's superintendent, Ashley?

A. About lumber?

Q. You said he complained. I presume you were talking about lumber.

(Testimony of William E. Schaefer.)

A. No, I didn't—I don't know the date on that.

Q. Well, the month? [1231]

A. I don't know the month.

Q. The place?

A. At the Macri office there in the yard.

Q. The job office? A. The job office, yes.

Q. The time of day?

A. I'd say it was about in the neighborhood of 5 o'clock.

Q. 5 p.m., about; did you make any note at that time with respect to it, yourself?

A. No, I didn't.

Q. Did you make any statement with respect to it yourself? A. To who?

Q. In that conversation? A. No.

Q. Now, the Mixomobile tower was aboard it as placed by your folks, by the Schaefer operations, or had you bought it that way?

A. We bought the equipment that way.

Q. And you had used the equipment that way before it came to this job? A. Yes.

Q. Where? A. Portland.

Q. On what?

A. Oh, I think it was a few jobs before we came up here. [1232]

Q. Well, give me those jobs, will you please?

A. The name of them.

Q. Yes.

A. I'd have to look them up in the record.

Q. How long would it take you, Mr. Schaefer?

A. I don't know.

(Testimony of William E. Schaefer.)

Q. What kind of jobs?

Mr. Olson: I don't see the materiality, your Honor, what jobs or what kind of jobs.

A. I believe one of them was a building——

Mr. Olson: Just a minute; if he was in Portland.

The Court: Well, I'll let him ask what jobs. I don't think we should stop to get the information as to what the names were.

Mr. Holman: No, your Honor.

Q. One was a building? A. Yes.

Q. How high a structure? Stories, I mean.

A. A one story building, about 12 or 14 feet.

Q. 12 or 14 feet high?

A. High, the walls.

Q. And how large was that operation? How long was the mixer on that operation?

A. About two days.

Q. And what else was it used on down there?

A. I don't recall the type of job; it might have been some flat work; I wouldn't say.

Q. Well, I don't want "might have been," but if you know, tell me. A. I don't know.

Q. All right, sir. How long was it used in Portland before it was brought up here?

A. I believe just a few days.

Q. When did you purchase that?

A. I don't know the date on that.

Q. Well, the month, or the year? A. 1944.

Q. You purchased it in 1944; new, or second-hand?

A. It was guaranteed new when we bought it.

(Testimony of William E. Schaefer.)

Q. What do you mean, "guaranteed new"?

A. We bought it from the Mixomobile people.

Q. Oh, a new machine from the Mixomobile; and was it purchased as exhaustible on this job, or was it purchased for use in the city after this job was over?

A. It was purchased for this job, and sold when we got through with this job.

Q. Sold to this job? A. No.

Q. I didn't get you.

A. It was purchased for this job. When we got through with [1234] this job, it was sold, we sold it.

Q. I see; but it was not equipped with the chute or the extensions? You had that ordered especially?

A. That's right.

Q. And who made that?

A. There was a chute that we made, Concrete Construction Company mechanics made, for this mixer before it came up here. It was attached to the hopper, and after being on the job awhile we took the hopper, tower, bucket and that chute off of it.

Q. I know, you've covered that, but who made the chute and the extensions?

A. The first one was as the mixer came up. The second one was made by Mixomobile.

Q. One chute wore out and you had to get another one?

A. No, we dismantled that one with the tower.

Q. I understand, sir; the first chute and the ex-

(Testimony of William E. Schaefer.)

tensions you had made for the purpose of using with the tower? A. That's right.

Q. And then you found that was not a practical matter, and you got chutes direct from the Mixer company, correct? A. No.

Q. What was correct?

A. We took the tower, hopper, bucket and that chute off to get rid of some weight. [1235]

Q. Yes, sir.

A. Easier to move around.

Q. How much weight did you take off by removing that tower? A. 3000 pounds.

Q. A ton and a half, approximately?

A. That's right.

Q. And after that she weighed about 11 tons?

A. After that that mixer weighed 16,000 pounds, 8 tons.

Q. At the time of this conversation you say you had with Mr. Macri with respect to roads were there any operations on the Roza Project in progress? A. On the Roza Project?

Q. Yes. A. Yes.

Q. And you saw them?

A. I believe I seen a few structure excavations before we signed the contract on 1062.

Q. Well, you saw operations, didn't you, sir?

A. Yes, that's what I said.

Q. You saw them digging? A. No.

Q. What did you see?

A. I seen the excavation.

Q. Well, at least you saw the evidence of how

(Testimony of William E. Schaefer.)

they got to excavations, did you not? [1236]

A. Yes.

Q. On the Roza Project, sir; now, did you make any layout map of the roads, the public roads, that were on there? A. No, I didn't.

Q. You had a right of way map, did you not, government right of way map? A. Yes.

Q. And you knew, except for the public roads it indicated, the surrounding country was privately owned, did you not? A. Yes.

Q. And you knew except for the public roads the access to the Roza Project had to be either acquired from private property or not at all, for private roads, sir?

A. For making private roads?

Q. Yes.

A. Well, I understood that anywhere there was structures, why, you could make a road and go in through the fields anyplace to get at these structures or laterals.

Q. In other words, you understood the government had secured that right, sir? A. Yes.

Q. Was there any indication of that on the right of way map? A. Not that I know of.

Q. Was there any communication to you of that?

A. No. [1237]

Q. And you made no inquiry to ascertain, you made no inquiry from the government to ascertain?

A. No.

Mr. Holman: That's all.

(Testimony of William E. Schaefer.)

Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, did you order the Mixomobile yourself, or did your brother do that?

A. Brother done that, after talking to me and the superintendents.

Q. That is, you all——

A. We discussed the operation of this job before he purchased it.

Q. And you had before you the specifications in 1062? A. Sir?

Q. You had before you specifications 1062 when you made that decision? A. Yes.

Q. And the layout structures, structure layout, I mean? A. Yes.

Q. What is the capacity of that Mixomobile? That is, how many yards of cement will it hold at any one time?

A. The drum on that mixer is a two yard drum with a one yard bucket.

Q. What is a bucket? I don't understand that.

A. That is where the dump trucks dump a cubic yard batch [1238] into this bucket, then it is raised into the hopper.

Q. It is a one yard bucket?

A. One yard skip, is the name for it.

Q. And you use that skip to lift your materials into the drum? A. That's right.

Q. And it is a two yard drum?

A. That's right.

(Testimony of William E. Schaefer.)

Q. And I believe it has been testified that Mixo-mobile would handle 20 to 30 yards in an hour, is that correct? A. Yes.

Mr. Hawkins: I think that's all.

The Court: Any redirect?

Mr. Olson: No, your Honor.

The Court: That's all, then.

(Whereupon, there being no further questions, the witness was excused.) [1239]

LAWRENCE E. BUFTON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. Lawrence E. Bufton.

Q. Where do you reside, Mr. Bufton?

A. Portland, Oregon.

Q. What is your present occupation?

A. I'm chief owner and operator of a silica sand plant in Eugene, Oregon, at the present time.

Q. Are you a graduate or licensed engineer?

A. No, I have some engineering knowledge, but I'm not a graduate engineer or a licensed engineer.

Q. Have you ever been employed or worked as an engineer?

A. Well, was field engineer for the Portland Cement Association for two years.

(Testimony of Lawrence E. Bufton.)

Q. Now, that Portland Cement Association——

A. It is a national organization.

Q. Pardon?

A. A national organization.

Q. Have you had any experience, Mr. Bufton, in concrete [1240] construction work?

A. Considerable.

Q. And over what period of time?

A. Well, I was made secretary of the Pacific Bridge Company in 1907. Everything that I've done since then has been associated with construction work in some way or another.

Mr. Holman: Pardon me; could I get that bridge company? A. Pacific Bridge Company.

Q. Well, now, did you ever personally supervise—— A. Yes.

Q. ——the construction work? A. Yes.

Q. Can you just relate what experience you have had in that regard, Mr. Bufton?

A. Well, I organized a partnership in 1910 and supervised some of my own work until that partnership was dissolved in 1916. I was superintendent for the Tacoma Dredging Company and their subsidiary company until close to the end of 1919, and then the following two years I was field engineer for the Portland Cement Association; then I spent nearly two years managing a concrete pipe plant in Spokane.

Q. When was that, do you know?

A. Well, let's see, it would be about 1921 and 1922. Then [1241] I returned to Portland and the

(Testimony of Lawrence E. Bufton.)

following year I did small work in my own name; then I became associated with Parker Schram Company on a limited partnership way. I was general superintendent for them until the end of 1944.

Q. How many years would that be, then, that you were associated with the Parker Schram Company of Portland? A. Twenty years.

Q. And how many of those years were you general superintendent?

A. Well, about eighteen.

Q. About eighteen? A. Yes.

Q. Are you connected with the Parker Schram Company at the present time? A. No.

Q. Who is their general superintendent at the present time? A. My son.

Q. Now, in connection with these operations, Mr. Bufton, did you have any concrete work?

A. Well, yes, we did thousands of yards of concrete work.

Q. All right; now, getting back to your time that you were connected with the Portland Cement Association, what was the nature of your work with them? You said you were field engineer. What was the nature of your work?

A. Well, we did no designing. We consulted with engineers [1242] about the proper way to use cement. As a matter of fact, up 'till about that time cement had been very poorly used, and the cement association had carried on a lot of experiments in the Lewis Institute in Chicago, and they had found that by the use of less water, proper mixes of sand

(Testimony of Lawrence E. Bufton.)

and gravel, and so forth, much greater strength could be had, and as field engineer our duties were more consulting toward the end of getting better concrete out of Portland Cement.

Q. Well, now, when you were with the Pacific Bridge Company what was the nature of the work you were doing with them, just in general?

A. Well, I was secretary of the work. I did some bidding, but no estimating for them, I wouldn't say.

Q. You did what?

A. I made out bids for them, but I say very little estimating; none of any consequence.

Q. Now, you mentioned you were with a pipe concern in Spokane for about two years, you said, about 1921 and 1922?

A. Yes.

Q. Did you have any experience with any concrete work with them?

A. Well, we made concrete pipe; practically all of our pipe was used by irrigation districts, and we laid a considerable amount of it. We did very little formed concrete [1243] work, practically none.

Q. Mostly concrete pipe, you say.

A. That is right.

Q. In connection with what kind of systems?

A. Irrigation systems.

Q. Did you say what capacity you had with this pipe plant in Spokane?

A. Well, I was associated with another man, and we operated three concrete pipe plants at that time, one in Spokane, one in Helena, Montana, and one in Grand Forks, British Columbia.

(Testimony of Lawrence E. Bufton.)

Q. Now, did you do any construction work east of the Cascade Mountains while you were connected with the Spokane plant, other than this pipe work?

A. During that period of time I didn't.

Q. Did you answer my question, Mr. Bufton?

A. Beg pardon?

Q. Did you do any construction work other than this pipe work during the time?

A. Not during that period, no.

Q. Have you had any experience with reference to hauling materials, and its cost and expense?

A. Oh, yes. The first work I ever did east of the Cascade Mountains was reservoirs in Pendleton, Oregon, and we had 8000 feet of concrete conduit from the headworks. [1244] That was in 1913-'14, I think, and the Parker Schram Company done a great deal of work east of the Cascades. We built the Walla Walla Mill Creek dam, we did miles of work for the telephone company, paved the airport at Baker, we cleared the right of way from Pendleton to Baker, I think, and we built the telephone line from Baker to the Snake River, that is, all except wire stringing, and then during the war period it was necessary to build a line, new circuits, very fast, from The Dallas to Granite Falls. We hauled all the materials in for cross arms and line materials.

Q. Is this while you were general superintendent of the Parker Schram Company?

A. Yes. We went over that line twice.

(Testimony of Lawrence E. Bufton.)

Q. Was this done under your supervision and direction?

A. Under my general supervision.

Q. Pardon?

A. My general supervision, I said.

Q. What year was this done, about, if it was during the war?

A. That must have been '42, about. It might have been '43, however.

Q. Now, this dam that you say you built, what dam is that?

A. Mill Creek Dam, at Walla Walla.

Q. And what was the nature of that work?

A. Well, there was a fill there, something over a million [1245] yards.

Q. A fill of what? A. Earth fill.

Q. Was there any concrete work connected with that?

A. Well, yes, concrete diversion dam, and concrete diversion structures, a concrete conduit that was under the dam, concrete control house, and some of the canals, canal lining.

Q. Now, in connection with your work at Parker Schram, did you ever do any estimating or bidding in connection with that work?

A. Yes, I did nearly all their bidding.

Q. And over a period of how many years?

A. Well, let's say a period of eighteen years.

Q. And did that include construction, concrete construction? A. Yes, a great deal of it.

(Testimony of Lawrence E. Bufton.)

Q. Can you give us any specific instances of your bidding for them?

A. The biggest job that we did was a joint venture. We built the concrete pontoon bridge across Lake Washington.

Q. The floating bridge?

A. Yes, a mile and a quarter long, four lanes wide, walls on each side.

Q. Who made up the estimate?

A. I did it, finally. I had some help there. Our problem [1246] was more what we were going to do before we got the work started. We spent half a million dollars before we got a pay quantity. We had to build graving docks.

Q. Were you one of the parties who made up that estimate?

A. Yes, I was.

Q. Who made up the final bid?

A. We submitted all the figures, and I was the one who finally compiled all the figures.

Q. About when was that?

A. Let's see—that must have been '39 or '40.

Q. Now, have you ever had anything to do with reclamation concrete construction work?

A. Well, except bidding on some reclamation work, very little, however, and I couldn't recall the names of the district, until about a year ago. Now, a little over a year ago I made an examination for the Bank of America of some work that was under construction in the Deschutes Project. I spent several days on that project with the engineers and contractors.

(Testimony of Lawrence E. Bufton.)

Q. How did you happen to make that examination?

A. Well, this contractor had two jobs. I examined both of them. One of them was a job he was losing a lot of money on. That was the reason for it, I presume.

Mr. Holman: May I have the last of that answer?

A. The contractor had two jobs. One of them he was losing [1247] heavily. I presume that was the reason why the bank asked me to make an examination for them, and this work I speak of now, in the Deschutes Project, I looked up some notes I had, was Specification 1100.

Q. Whose specification?

A. Well, that's Bureau of Reclamation specifications number 1100. The contract was about twice as big as this contract. There were numerous concrete structures.

Q. Pardon me, you say twice as big. Can you tell us approximately how many cubic yards of concrete?

A. Well, I was thinking in dollars, more or less, more than number. That contract price over there was something over \$245,000.00, and I've seen the preliminary estimates on this job, which were, I think, about \$128,000.00.

Q. All right; as far as the concrete work was concerned, what kind of concrete work was this Deschutes, Oregon, job?

A. Well, the structures there were for the same

(Testimony of Lawrence E. Bufton.)

purpose as the structures here; however, they weren't of exactly the same type. I would say that the form work on those structures was more difficult, if anything, than the form work on these structures here.

A. Well, the inlets and the outlets were warped sections, I mean they curved horizontally and vertically, which is a [1248] different form to fabricate, to start with, and it is difficult to place. On that job there was 3550 cubic yards of concrete in the preliminary estimate.

Q. 3500, you say?

A. 3550 cubic yards, in the preliminary estimate. I was on the job in the early part of February.

Q. What year, by the way, were you on it?

A. 1946.

A. That's about a year ago, then?

A. Yes, just, a little over a year ago. The work was started, well, they got their notice to proceed in October, and the work was started around the first of November. There was considerable preliminary work too be done in the way of constructing bunkers and so forth, before the concrete could be started, also the pre-fabrication of forms. The concrete practically started the first of December. At the end of January they estimated for payment 514 cubic yards of concrete.

Q. Now, Mr. Bufton, you say that the concrete structures there were for the same general purpose?

A. Yes.

Q. As the concrete structures on 1062?

(Testimony of Lawrence E. Bufton.)

A. That's right.

Q. Can you develop that a little more, to show the similarity between the job you were over and this one? [1249]

A. Well, I mean they were to control the flow of water. It was a gravity system, no pumping plant involved, passages through siphons, and in a general way, to control water over the land to be irrigated.

Q. Were the concrete structures on this job that you went over in Oregon, being the Bureau of Reclamation specifications 1100, did they involve excavations? A. Oh, yes.

Q. And the placing of structures in excavations?

A. Yes, sir, and the pay quantities set up were the same as here, I would say very closely, I mean in the way of the work required to be done.

Q. Now, how about that job, Mr. Bufton, as to whether or not the same contractor was doing the excavation and the concrete structures, or was there a sub-contract on it?

A. No, the general contractor sub-contracted his work to a sub-contractor at a price of \$30.00 per cubic yard.

Q. Sub-contracted that work?

A. A sub-contractor on the concrete work had \$30.00 per cubic yard, and he furnished all the form lumber.

Mr. Holman: Just a minute. He said "he" furnished.

Q. I was going to ask him who.

A. Beg your pardon?

(Testimony of Lawrence E. Bufton.)

Q. Who furnished the lumber? It isn't quite clear whether it was the contractor or the sub-contractor. [1250]

A. The sub-contractor provided all his form lumber and all his concrete set-up; in fact, he had all the concrete work, all there was to do with it.

Q. He furnished all his form lumber?

A. Aggregate and cement of course were furnished by the Bureau of Reclamation, as they are in all of those jobs.

Q. Now, who did the excavation work for that?

A. The principal contractor.

Q. Then the only difference between that contract or sub-contract on 1100 and 1062 was that the sub-contractor furnished the lumber on the one down in Oregon, and not down here?

Mr. Holman: Just a minute. The only difference in that respect, you mean, don't you? I object to the question otherwise. If he directs it to this one thing, that is all right.

A. There was that difference, then.

The Court: There was that difference, and we'll not go into how many others unless you want to.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Bufton, did you have an opportunity to examine the excavations that were made down there?

A. Yes, I went over the work with the engineer and also with the contractor, or rather, the con-

(Testimony of Lawrence E. Bufton.)

tractor's superintendent, and I talked with the subcontractor's superintendent. [1251]

Q. And what was the situation with reference to the banks of the excavations and lateral clearance, down there?

A. Well, now, a good part of the excavation there was made by tractor and 'dozer, and naturally the banks were sloped. You can't make a straight bank with a 'dozer.

Q. You say the banks were sloped?

A. They were sloped, yes. I would say they were flatter than 1 to 1.

Q. Were flatter than 1 to 1?

A. Flatter than 1 to 1.

Q. Now, have you been over the job on 1062?

A. I went over the 1062 and 1068 with Mr. Schaefer, Mr. Darcy, and Mr. Waltie, a week ago last Saturday. We spent about six hours on the two jobs, I would say.

Q. Were you on the job at any time during construction?

A. No, I was not.

Q. Did you examine the concrete structures as they existed out on the project then?

A. We got out and examined structures all the way along, I don't know how many; a great number on both projects. Every time we'd come to a new structure we would get out of the car and go and look at it, and the chute and the diversion structure, and so forth.

Q. Now, have you examined, Mr. Bufton, the specifications covering 1062, being plaintiff's Exhibit 3, and the [1252] structural layout plans—

A. Yes.

(Testimony of Lawrence E. Bufton.)

Q. —being plaintiff's Exhibit 12 in this case?
Have you examined those?

A. Well, I've read the specifications and examined the plans.

Q. On 1062, this job? A. Yes.

Q. And assuming, Mr. Bufton—

Mr. Holman: Are you through with qualifications?

Mr. Olson: Yes.

Mr. Holman: May I ask a question, please?

Mr. Olson: Yes.

Voir Dire Examination

By Mr. Holman:

Q. Mr. Bufton, when you spoke of being with the Portland Cement Company—

A. Not the cement company; the cement association.

Q. Portland Cement Association, is the correct name Superior Portland Cement Association?

A. Portland Cement Association.

Q. Superior Portland Cement?

A. Oh, no; you're thinking of a cement concern. This is an organization. They don't sell cement at all.

Q. I see; and what was your capacity with them?

A. Field engineer, I said.

Q. For the association? [1253]

A. I beg pardon?

Q. For the association itself? A. Yes.

(Testimony of Lawrence E. Bufton.)

Q. And its members?

A. And its members, yes. I wasn't working directly for any manufacturer at all.

Q. Now, on the Lake Washington bridge the principal contractor was the Puget Sound Bridge and Dredge, was it not?

A. It was a joint venture by the Puget Sound Bridge and Dredge Company, Parker Schram Company, Jack Pomeroy, and that California man, I can't think of his name right now.

Q. Goerig?

A. No, it wasn't Goerig; it was a California man; I'll think of his name in a minute. Does it matter? There were four contractors.

Q. I'm not captious on that. Mr. Goerig put in the piers for the bridge down there.

A. No, no, that was the approach to the pontoon bridge, I think.

Q. Yes, sir. That was built, was it not, under the——

A. Toll Bridge Authority?

Q. ——Toll Bridge Authority. A. Yes.

Q. And the estimates were prepared by Lacey V. Murrow, the State Highway Engineer? [1254]

A. Not the estimates it was bid upon. Lacey Murrow made an estimate of what it would cost.

Q. Preliminary estimates were made by Lacey Murrow?

A. The contractor makes his estimates too. The contractor doesn't care what the engineer estimates. If he knows his stuff he makes his own estimate.

(Testimony of Lawrence E. Bufton.)

Q. That may all be, sir, but the preliminary estimate for the job was made by Lacey Murrow?

A. For the Toll Bridge Authority.

Q. For the Toll Bridge Authority, and those were submitted to the bidders, were they not?

A. They were not, at all. Lacey Murrow submitted to the Toll Bridge Authority his estimate of what he thought the contractor would take the work for. What I'm talking about is the estimates that we made up to determine what we would bid on the job. Lacey Murrow's estimate might have been half a million dollars higher than ours.

Q. Be all that as it may, you were supplied with a preliminary estimate as to quantities, were you not?

A. Yes, we bid on unit quantities, like this contract here.

Q. All right, sir.

Mr. Holman: That's all I have, your Honor.

The Court: All right, proceed.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Bufton, you say you have examined these completed [1255] structures? A. Yes.

Q. And examined the structure layout plans and specifications. Now, what in your opinion would be the lateral clearance reasonably required not only at the foundation of the structure but from

(Testimony of Lawrence E. Bufton.)

there on up, and your opinion as to any slope reasonably required for the banks——

A. Yes, indeed.

Q. ——wait a minute; in order, Mr. Bufton, for a contractor to properly build and assemble in the excavation forms for the concrete structures to be placed therein, and to thereafter remove the forms, the panels, from the completed concrete structures?

Mr. Holman: Just a minute. May we have the question, your Honor?

The Court: Yes, all right, the reporter can read it, and if you will wait until the lawyers make their objections.

(Whereupon, the reporter read the last previous question.)

Mr. Hawkins: Your Honor, we object to that question for this reason: I don't think it is within the issues of this case; the language of the question is not in accordance with the language of the specifications. In the second place, there is no way for us to tell what [1256] this witness may mean as to the word "proper." Counsel has asked this witness what is the necessary clearance or required clearance in order for the Concrete Construction Company to properly place its forms and properly remove those forms. Now, I don't think that that word is sufficiently definite on which to predicate a hypothetical question.

The Court: Do you have an objection?

Mr. Holman: I join in that objection, your

(Testimony of Lawrence E. Bufton.)

Honor, plus the fact that in order to have a true test here, the question would have to disclose the field excavations and the field operations from both the point of the principal contractor and the sub-contractor, and to ask this gentleman as an expert to state what was reasonable widths or depths, or reasonable dimensions, let's say, is asking him to substitute his judgment for the Court. It is not a true——

The Court: To substitute it for what?

Mr. Holman: His judgment for that of the Court. That is the very thing before your Honor to be determined, and it is not the proper basis for a hypothetical question. I have this in mind, your Honor. This witness can testify, for instance, as he qualified a while ago, with respect to cost of hauling; he's had that experience. He could testify with respect to the amount of lumber in [1257] the structure, and the amount of aggregate, he's had that experience, as reasonable amounts, but counsel is now asking the question of this witness to state for this case what are reasonable operations as between the contractor and the sub-contractor, without the question showing all that has come before your Honor. It doesn't even show in his question that this gentleman has been present and heard it.

The Court: Is it your position, Mr. Holman, that an expert can testify only on a hypothetical question based on testimony in the case?

Mr. Holman: No; the hypothetical question itself must be conformable to what is then before the Court.

(Testimony of Lawrence E. Bufton.)

The Court: Don't you think an expert can go out and make an examination of a structure, and testify from his background of experience and special knowledge as to technical matters in connection with the structure?

Mr. Holman: I think he can do that, but I think he can't substitute his judgment for the Court's judgment on the very matter before the Court, namely, the very question of reasonableness between the contractor and the sub-contractor, and that's what is asked for.

The Court: Well, how am I to determine the reasonableness if I haven't any technical knowledge as an engineer? I understand your position is that the [1258] specifications require no particular clearance and slope on these excavations. That's correct, isn't it?

Mr. Holman: Yes, one particular one.

The Court: But there is no question but that under this sub-contract it was the duty of Mr. Macri to make these excavations?

Mr. Holman: That is correct.

The Court: Now, the question of how he should make them, and what clearance he should allow, is a question of what would be reasonably necessary under all the circumstances.

Mr. Holman: That, may it please the Court, is a matter that I claim in objecting to this question is a matter for your Honor to determine, in view of the fact that counsel waived a jury, or that a jury was waived, and that this gentleman, regard-

(Testimony of Lawrence E. Bufton.)

less of his qualifications, can't sit there and pass judgment upon the very thing that's the issue before your Honor.

The Court: I think it is a proper subject of expert testimony. I'll overrule the objection.

Mr. Hawkins: I would like to make further objection, your Honor, that this witness has testified to no experience in placing concrete forms in excavations.

Witness: Yes, I have, thousands of square feet of them, supervised the placing of them. [1259]

Mr. Hawkins: Well, I understood his testimony to be that the only type of work of this kind that he had any experience with was that in connection with some job down in Oregon with which there was a loss, a bank had requested him to go out and look at it after it was under way. Now, I don't believe the witness has testified to any experience of this particular type.

The Court: Well, he doesn't have to have had experience in this particular narrow field, does he, if he has general concrete experience over a long period of years? You don't have to have an expert on each particular line, do you?

Mr. Hawkins: Well, that may be. Here we have forms set down in the ground. We don't know whether he's had experience on buildings where there was an open area around.

The Court: I think he's shown general qualifications. Overrule the objection. Do you understand the question?

(Testimony of Lawrence E. Bufton.)

Witness: I know what the question was asked, and what the answer is. You have to place forms, and your sheeting, and your strong-backs, and your ties, whatever they might be, which altogether take up 9 inches to a foot. Now, a man's got to have room enough to work to get those forms in there, and to get them out. I think the best answer [1260] that can be given to that question is the fact that the Bureau of Reclamation have done this thing over thousands and thousands of times, and they apparently have come to the conclusion that the best way it can be done would be to the 1 to 1 slope on the side, and they specify it in their specifications in that way, defining the amount that they are going to pay for.

Q. Well, what is your opinion?

A. I think that a proper excavation should be at least a foot clearance on the outside of the base of the structure, and on a slope, so a man can bend over, so forms can be slid down there and placed, and straightened up. Then where they're pulled, if the nest of forms is made out of ship-lap, there is bound to be a little thin between the boards. When you pull that up you've got a friction to overcome. If you can turn the thing over and slide it out again, you have then worked in a proper excavation.

Q. Do I understand, then, Mr. Bufton, that it is your opinion that one foot out from the base of the foundation of the structure, with a 1 to 1 slope,

(Testimony of Lawrence E. Bufton.)

is a reasonable and is the reasonably required lateral clearance for the placing and removal of forms?

A. Yes.

Mr. Holman: Just a minute; we object to that.

Mr. Olson: Wait until I finish. [1261]

The Court: Objected to as leading, I presume?

Mr. Hawkins: Yes, your Honor, and also he's already interrogated about that very particular thing, and the answer is on record.

The Court: I think he was just trying to clarify the answer. If you want to ask him again what his opinion is, I think I know what he testified to.

Mr. Olson: Well, I do too, but it is a matter of counsel bringing the question out, he said "so and so, but he didn't say just this."

The Court: Well, go ahead, if you want to make it more particular.

Direct Examination

(Continued)

By Mr. Olson:

Q. Then with reference to your answer that you just have given, Mr. Bufton, I'm not sure as to whether you've expressed it as to what your personal opinion based on your experience is, with reference to this lateral clearance and the slope of the bank, as regards to what is reasonably required to build these structures as you have examined them out on this specification 1062.

Mr. Holman: Just a minute; I submit counsel is now trying a reiteration of the very thing he's accomplished by this expert.

(Testimony of Lawrence E. Bufton.)

The Court: It is to clarify his prior answer. He said the Bureau had come to such and such a conclusion. [1262]

It isn't entirely clear to me whether he adopted that opinion or not. I'll overrule the objection. I suppose the record should show that the same objection stands.

Mr. Holman: And I would like to move striking from that prior answer his conclusion that apparently the Bureau has adopted those specifications, because the specifications speak for themselves, your Honor, and it is immaterial what this gentleman thinks about what the Bureau has done.

Mr. Olson: Your Honor, it is explanatory of this man's testimony.

The Court: Well, I'll let it stand. I think the only thing the Court is concerned with now is his opinion. That is the only thing the Court will regard in the answer, is his opinion.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: I don't think the question is quite finished yet.

Direct Examination

(Continued)

By Mr. Olson:

Q. Please state what your own opinion is, based on your experience and your examination of these structures, plans and specifications, and structural

(Testimony of Lawrence E. Bufton.)

layout plan, with reference to the matters contained in my question. [1263]

Mr. Holman: I object to that as having been already answered by this witness; reiteration.

The Court: Overruled.

Witness: Well, you would certainly have to have a foot of clearance laterally on the same level at the bottom in order to let your plate down there, when you're being pushed away from your work, as you are, by your strong-backs and your bolts and so forth, and if I were doing the excavation myself, and putting those forms in, I certainly wouldn't make the excavation anything except on a slope.

Q. Of approximately what?

A. I think that is a proper way to do the work, yes.

Q. Approximately what slope?

A. Not less than 1 to 1.

Q. All right. Now, counsel raised some question as to what experience, if any, you had in this particular type of concrete placement. Have you had any experience, Mr. Bufton?

A. Oh, we've built head walls—that's a silly question. I refuse to answer it.

The Court: Well, I think you should answer it, Mr. Bufton. We're making a record here.

Witness: Can I say I'm annoyed, then? Yes, I have had lots of experience of that nature. [1264]

Q. Of what nature, specifically?

A. Well, I mean head walls, and structures of this same sort, structures to convey water, for the same purpose and everything else.

(Testimony of Lawrence E. Bufton.)

Q. Now, counsel brought up another thing with reference to this Oregon job that you had experience with, that had sustained a loss. Did you indicate or do you intend to indicate that there was a loss on this Portland job as far as the concrete structure portion of the job was concerned?

A. The man was making money on the reclamation job, but he was losing money on the other job.

Q. And the other job was what?

A. A clearing job from Albany to Toledo, Oregon.

Q. Having in mind and considering the specifications covering 1062, being plaintiff's Exhibit 3, the structural layout plan, being plaintiff's Exhibit 12, your examination made in the field of the completed structures on 1062, and assuming that the form lumber to be used for the concrete structure forms was furnished in proper quality and on time, as needed and required in making the panels, and assuming further that the excavations were made by the principal contractor with the lateral clearance of at least one foot at the foundation of the structure, and laterally outside of the structure, and the bank is sloped [1265] to a 1 to 1 slope, and assuming further that these excavations, the floor of the excavations, are hand excavated in accordance with the structural layout plan, so as to be in proper condition to receive, or be in condition to receive the concrete as provided for in the structural layout plans, and assuming further that the excavations were made ahead in that manner suf-

(Testimony of Lawrence E. Bufton.)

ficiently far enough so that the contractor in assembling and making the structure forms and pouring the concrete may proceed without being delayed, what in your opinion, Mr. Bufton, would be the length of time reasonably required by a subcontractor to assemble and place those forms in the excavation, pour the concrete, and to remove the forms, and to complete that part of the job called for in specifications 1062?

Mr. Holman: Just a minute, Mr. Bufton. I object to the question for the following reasons, your Honor. In the first place counsel has used in his question the term bank. Now, if by bank counsel advises the witness that he means all exterior excavations, that is one thing, all sides. If he's talking about one bank, it can't be competent. Counsel has also left out of his question elements which he has brought into this case and put forth to the Court as affecting the position of the subcontractor, namely the type of equipment, its weight, its [1266] accessibility, and the distance from the point of securing aggregates to the point of deposit, and the distance from the job yard to the point of deposit. In other words, counsel is leaving out some of the elements, your Honor, and he's left out the additional element as to whether or not there was a project line-out or a line-out upon which the work could be made as required by the sub-contract.

The Court: Mr. Hawkins?

(Testimony of Lawrence E. Bufton.)

Mr. Hawkins: I join in that objection, your Honor.

Mr. Olson: Your Honor, with reference to the location of the stockpile, I might ask this witness if he observed where that was, and include that in the question.

The Court: This point that counsel raises about the banks, I don't remember just how you brought that in, but the thought that I have in mind, some of these banks were supposed to be excavated vertically, and some with a slope to 1 to 1——

Mr. Olson: Well, I think my question is intended, at any rate, to refer to the exterior banks.

The Court: Exterior banks?

Mr. Holman: That would be all exterior banks?

Mr. Olson: All exterior banks that were not——

Mr. Holman: Let's say all outside banks. [1267]

Mr. Olson: All exterior banks that were not used for pouring concrete against.

The Court: All exterior banks where an outside form is required; is that what you had reference to?

Mr. Holman: That was my objection to that phase of it. He just used the term "bank." There is quite a difference.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Bufton, when you were out on the job 1062 did you see where the stockpile was?

A. Yes, I saw it.

(Testimony of Lawrence E. Bufton.)

Q. You're aware of its location with respect to the structures? A. Yes, I was there.

Q. And having that feature in mind, then, and also having in mind when I used the term "bank" that I refer to the exterior banks where outside panels were required, would you then answer the hypothetical question?

The Court: May I ask this; I'm not sure your question refers to a sub-contractor, is that correct?

Mr. Olson: Yes.

The Court: A hypothetical sub-contractor?

Mr. Olson: Yes.

The Court: You're not referring to how long it would take Mr. Schaefer with the men he had?

Mr. Olson: No. [1268]

Mr. Holman: If he's talking about a sub-contractor, I withdraw that objection; it is not involved.

Mr. Olson: Oh, yes; I don't think it would be proper for me to ask how long it would take Mr. Schaefer to do it.

The Court: Then the question of how many men he had and the equipment would be a matter of cross-examination?

Mr. Olson: I intend to touch on the equipment with Mr. Bufton.

The Court: Do you have the question in mind now?

Witness: Not thoroughly. What was the first part?

(Testimony of Lawrence E. Bufton.)

The Court: I wonder if it might not be best to re-frame the question, and put in the elements that we've discussed here, and then objections can be made again. I think it would be better than trying to go back over all this discussion.

Mr. Olson: All right.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Bufton, having in mind and considering the specifications covering 1062, being plaintiff's Exhibit 3, and having in mind and considering the structural layout plan, being plaintiff's Exhibit 12, and having in mind your investigation and inspection that you have made out in the field, which you have described in court, of the [1269] completed structures on 1062, and of the location of the stockpile of the aggregate for the concrete, as you examined it on the field, and then assuming, Mr. Bufton, that the excavations being made by the prime contractor were so made that they had a lateral clearance all around the outside of the structure of one foot, and the bank from the base of the foundation of the excavation to the surface of the ground at all points opposite where an outside panel or form was to be placed around the concrete structure had a slope of not less than 1 to 1, and assuming further that the floor or the foundation of the excavation was made so that it was to the proper, or to the

(Testimony of Lawrence E. Bufton.)

elevation or grade as called for by the structural layout plans and the specifications, so that it was ready to receive concrete, and assuming further that the excavations were made sufficiently in advance and far enough ahead so that the concrete forms and concrete pouring could be done and performed without being delayed or held up because of excavations not being ready, and assuming further that the lumber, the form lumber, was being furnished by the prime contractor and was furnished of proper quality and on time for these forms as needed, so that there was no delay in making the panels, how long would it take, in your opinion, Mr. Bufton, for a sub-contractor to assemble, make and place the concrete forms, [1270] the structure forms, in the excavation, to then pour the concrete and to place the required steel and re-inforcing materials required in those specifications, to then remove the forms and to finish the concrete and to complete all of the structures as required in accordance with specifications 1062?

Mr. Holman: Just one minute. Your Honor, I have only this one objection, and it is largely by way of suggestion. When he uses the term "a sub-contractor", if he means an experienced and qualified sub-contractor; if that is what he means I have no objection to the question.

Mr. Olson: I'll include that in my question.

The Court: Yes, I think that should be understood as included.

(Testimony of Lawrence E. Bufton.)

Witness: Well, an experienced contractor—well, a contractor would show that he wasn't experienced if it took him over four months to do that job.

Q. I didn't get that.

A. I say, an experienced contractor couldn't take over four months to do that job under those conditions.

Q. Not over four months?

A. Not over four months, under those conditions.

Q. Now, using the same hypothetical question, what in your opinion would be the reasonable cost and value of the [1271] performance of that work by an experienced and qualified sub-contractor?

Mr. Holman: Just a minute. May it please the Court, I object to that as having already been covered by the witness's statement, his previous statement, as to a unit price—strike, that's incorrect. I beg your pardon. You gave a unit price on another job, did you not, Mr. Bufton?

A. That's right.

The Court: Do you have any objection?

Mr. Hawkins: No objection, your Honor.

Witness: Well, anticipating that question, I made up a little memo last night, or yesterday afternoon. I don't know whether this is proper or not.

Mr. Holman: May it please the Court, counsel has asked him——

A. Well, I'm going to take my answer from this.

Mr. Holman: Very well, but I'm submitting this, your Honor. An expert witness should give his

(Testimony of Lawrence E. Bufton.)

answer to the question, and then if he needs to explain it, he should state before-hand that he does, and if he doesn't, then it is a matter and within the province of cross-examination.

The Court: Yes, I think that is true. The question now is—I have no objection to your consulting [1272] a memo as to what your figures are, but I think the question is the reasonable cost or value, and that should be your opinion. Counsel can ask further questions if he wants further detailed information.

Witness: After calculating the work to be done, in order to give a reasonable answer, I figured \$27.88 per cubic yard.

Q. \$27.88 per—— A. Cubic yard.

Q. ——cubic yard. Now, did you make out an estimate in arriving at those figures on this job, Mr. Bufton?

A. I made it out yesterday afternoon when the Court was not in session.

Q. Does that figure include an allowance for the services of the sub-contractor?

A. Beg your pardon?

Q. I say, does that figure include an allowance for the services of the sub-contractor himself?

A. Yes.

Q. And overhead?

A. Well, I don't know whether it would be what a particular sub-contractor would figure or not, but I have an allowance in my figures for that.

Q. All right.

(Testimony of Lawrence E. Bufton.)

The Court: What was that last question, is that [1273] general overhead of the sub-contractor? Is that what the question was?

Q. I'm referring to overhead expenses on this job.

A. I have in my figures here covered home office and general supervision.

Q. Well, perhaps it would be informative. Could you give your estimate?

Mr. Holman: That I object to, your Honor. It is a matter of cross-examination.

Mr. Olson: I have no objection if you want to bring it out on cross-examination.

The Court: I think you may bring out what elements the total includes, but I don't think the entire estimate should be brought out.

Mr. Olson: I didn't get your Honor.

The Court: I think you may ask him, as you have done, what elements it includes, but I don't think it would be proper to bring out the details of the estimate on direct examination.

Mr. Olson: Now, I was going to propound another hypothetical question, your Honor, but maybe I can go on to something else.

The Court: Well, we can recess now.

Mr. Olson: I have another question or two I could go into. [1274]

The Court: Well, all right, you may ask him.

Mr. Olson: I hate to go into this other thing at five minutes to twelve.

(Testimony of Lawrence E. Bufton.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Bufton, there's been some discussion here in the testimony, questions and answers, concerning the use of a transit mixer instead of the Mixomobile on this job.

A. You mean a transit mixer?

Q. Yes. I'll ask you first, have you seen the picture of the Mixomobile used on this job?

A. Yes.

Q. What is the situation, or what is your opinion, as to whether or not a Mixomobile as used by Mr. Schaefer and of which a picture is in evidence here, being pictures 35 and 36 of plaintiff's Exhibit 49, what is your opinion as to whether or not that is proper and correct equipment for use on this job out on the terrain as you saw it, referring to 1062?

A. I think the equipment used on this job is the best that the contractor could purchase.

Mr. Hawkins: I object to that as not responsive.

A. That is my thought, my opinion.

Mr. Holman: I do, too.

The Court: Well, I think that is in answer to it. I'll take it as an answer that in his opinion it was suitable. [1275]

Mr. Hawkins: If that is his opinion, yes. I gathered from his statement that isn't quite what he meant. He said it was the best that could be bought.

The Court: Will you read the answer?

(Testimony of Lawrence E. Bufton.)

(Whereupon, the reporter read the last previous answer of the witness.)

The Court: Well, I'll strike that answer. It was wartime. I don't know what kind he could have purchased.

Direct Examination

(Continued)

By Mr. Olson:

Q. I'm not asking as to availability of equipment. I'm asking as to whether or not it was suitable.

A. It was suitable, in my opinion.

Q. And how would the suitability of this Mixomobile be as compared with a transit mixer on this job, having in mind your inspection of the terrain and the structures?

A. Well, it is my opinion that it is a more economical type of equipment to use than a transit mixer is. I can explain that by saying this, that when you mix your concrete by transit mixer, you can haul about, well, in this case, one-half as much materials as you haul in a batch truck. In other words, a truck batching three 1-yard batches, as has been explained here, hauls twice as much concrete over the road in a given time as a [1276] transit mixer will, and besides that, the transit mixer has to remain at the site where the concrete is being poured until the concrete is entirely out of the mixer, whereas when you have a Mixomobile one batch can be dumped in the skip, loaded into the

(Testimony of Lawrence E. Bufton.)

drum, and the second one, if you want to do it that way, and get the third batch in there and get it on its way back to the batching plant in less time than the transit mixer can.

The Court: We'll recess now. This case will be resumed at 2 o'clock this afternoon.

(Whereupon, the Court took a recess in this cause until March 6, 1947, at 2 o'clock p.m.)

Yakima, Washington, March 6, 1947,
2 o'Clock P. M.

(All parties present as before and the trial was resumed.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Bufton, still having in mind and taking into consideration the completed concrete structures and the terrain as you examined it approximately ten days ago on job 1062, as you have testified to here, and the specifications covering 1062, being plaintiff's Exhibit 3, the structural layout plan, being plaintiff's Exhibit 12, and also having in mind the location of the aggregate [1277] stockpile as located out on 1062 and as you saw it when you were out there, as to its location, and then assuming that instead of having the lumber furnished of a quality that was adaptable at all times to the making of form panels for this type of work, and

(Testimony of Lawrence E. Bufton.)

also that the lumber was not furnished so as to be available at all times for use in making forms, and assuming further that the excavations, instead of having lateral clearance of one foot outside of the concrete structure at its foundation, and instead of the banks being sloped to a 1 to 1 slope at the points where outside forms had to be placed for the concrete forms, that such banks were excavated vertically or nearly so, and that the clearance between the outside of the line of the concrete and the outside banks was so limited that in installing the forms, the outside form panels, the banks had to be dug into to make room for the walers or strong-backs, and at times had to be dug out and excavated in order to get the forms themselves in, and assuming further that the panels is being removed, because of the restricted clearance, were damaged and had to be taken back to the yard for repair, and assuming further that instead of the excavations being completed in advance of the placing of concrete structures and concrete forms they were not available as needed, and assuming further that the floor or foundation of the [1278] excavation was not completed by hand excavation so that they were ready, available or prepared so as to receive the concrete, and assuming that the carpenters or employees of the concern which was putting in the forms had to do much of the foundation or floor excavation on the excavations, so that the job, instead of being completed in approximately four months' time, as you have testified is ample, that

(Testimony of Lawrence E. Bufton.)

the job having been taken over on March 13, 1944, could not be completed, because of the things I have enumerated, until some twelve and a half months later, or approximately April 8, 1945, how, in your opinion, and to what extent would that affect the cost, the reasonable cost and value, of the performance of the installation of the concrete forms, the making of the form lumber into the panels, the pouring of the concrete, including the cutting, bending and installing of the re-inforcing steel, and the furnishing of the nails, the removal and cleaning of the panels from the concrete after it was poured?

Mr. Holman: I will object to the question, your Honor, as eliminating one essential feature. Counsel's assumption would have to include no defective forms, and it doesn't include that, and I object further for the reason that the question doesn't show an operation in line with the sub-contract as called for by the terms of [1279] the sub-contract, and therefore it is outside of the issues, and I object for the further reason, your Honor, that it is immaterial what this gentleman thinks with respect to the purport of the question. Again counsel is asking this gentleman to pass upon the very issues that are before your Honor. He's asking him to determine the factual matter as against an opinion matter, your Honor.

Mr. Hawkins: Your Honor, I join in those objections for the reasons that counsel has stated, and I also would like to point out that in the various items detailed by counsel that the witness should

(Testimony of Lawrence E. Bufton.)

have in mind in giving his opinion, there is no definite, quantitative statement as to the amount of lumber furnished that wasn't adaptable, there is no definite statement as to the number of slopes that weren't 1 to 1, or the number of slopes that were vertical, or the distance between the concrete wall and the vertical bank; there was no definite statement as to the number of excavations in which it was necessary to do shovel work in order to put the strongbacks in place; there is no definite statement as to the extent of the damage done to the panels or as to the number of panels that were damaged in removing; there is no definite statement as to the extent, if any, of the failure to make timely excavations, that is, whether an excavation was not dug within a half an hour or within [1280] two hours or within two weeks after plaintiff had notified, if such notification was made, notified defendant Macri to have the excavation ready; there is no definite statement as to the depth as to which these excavations were made, and with particular reference to counsel's statement that the floors were not dug so as to receive concrete. None of the elements that I have mentioned has counsel given any definite quantitative value to. I therefore submit to the Court that it is impossible for this witness or any other expert witness to give an opinion based upon the items mentioned in counsel's question. It is impossible for such witness to state the effect on the cost. Those items may be trivial, or they may be substantial. It is wholly impossible for this wit-

(Testimony of Lawrence E. Bufton.)

ness or myself or the Court to determine from the facts supposed by counsel in his hypothetical question, to make any determination that counsel is now calling for. I mean all those items are variable and subject to modification, change, and so on, and I think the question, therefore, is improper, and that no one could answer it.

The Court: I think this presents the same question that the Court has ruled upon before in the case of another witness, and I take the same view of it as I did then. It seems to me impossible, because of the [1281] things just pointed out by Mr. Hawkins, that you could arrive at any definite conclusion by expression of an opinion of an expert witness as to how much the cost was increased. I assume that what the question is designed to elicit is the effect of these various elements that have been enumerated on the cost of the operation, and to a rough or approximate degree, the extent to which they affect it, in the opinion of the expert. I might say that the Court wouldn't take as evidence that this increased the cost by any number of dollars and cents, or would not take that as a finding of what the increase was. I will consider this as merely an indication of the expert's opinion as to the effect on cost, and the general or approximate effect on the extent. With that thought in mind I'll overrule the objections.

Mr. Holman: I was going to say, in view of your Honor's harking back in the record to the prior

(Testimony of Lawrence E. Bufton.)

situation, I would like to add to my objection this, that there has been no written claim presented as called for by the sub-contract, nor does the hypothetical question contemplate that, and I adopt Mr. Hawkins' objections.

The Court: That may be shown as an additional ground to the objection. Now, do you have the question in mind?

Witness: I think so. I couldn't answer that, evaluate [1282] that from a dollar standpoint, as your Honor said. When conditions of that sort existed, it certainly would definitely affect the ultimate cost of the work. Any job that takes 12 or 13 months to do that should be done in 4 months is wrong somewhere along the line. If the reason for the additional length of time required is because of the lack of preparation and the quantity of forms or the amount of excavation performed, I mean, well, speaking of quantity of excavation performed, I'll have to describe that. You see, the base that the concrete is going to sit upon has to be formed first. Now, that work can't all be done by any machine that's ever been made. There is a great deal of hand work necessary to do that work, and as to the clearance, the men who had to place forms and remove them had to have sufficient working clearance, or they couldn't perform their work. If in the situation described here, carpenters go out and do excavation work that they're not supposed to do, in the first place a carpenter doesn't want to handle a muck stick, and in the second place, he's

(Testimony of Lawrence E. Bufton.)

delayed an amount of time I couldn't evaluate, and the equipment is tied up and not used, managerial expense would be increased; well, getting back to the depreciation, again, their equipment, I mean, you might think of that as depreciation. You can not depreciate a piece of machinery [1283] just on the quantity of work that's performed by that machinery. In other words, you can't say a concrete mixer is one-tenth worn out when 1000 yards of concrete has been poured through it. The minute that machine leaves the factory obsolescence starts to work on it. If the equipment has been tied up 12 or 13 months instead of 4 months, that's an element; and then if men capable of performing what they believe to be a good day's work feel that they're on a sour job, they build up a feeling that they don't want to be there. It would be hard to keep men on that job. It would be hard to keep a foreman. You wouldn't want to come off a job where you had to seek employment someplace else, being on a job that was unsuccessful. In what percentage that would cost, you heard it said the other day it might cost two or three times as much. I think that is very possible.

Mr. Hawkins: I move that answer be stricken, particularly that last comment.

The Court: I think if he wishes to adopt that estimate of two or three times, I'll let it stand as his own opinion.

(Testimony of Lawrence E. Bufton.)

Direct Examination
(Continued)

By Mr. Olson :

Q. Mr. Bufton, you said you thought that was entirely possible. What is your opinion as to whether it would be that, or some other figure? I want to know what your [1284] opinion is.

Mr. Hawkins: Your Honor, I object to asking this witness for a figure. He's testified, I take it, that it would substantially increase the cost, and I don't believe there can be any further answer.

(Whereupon, the reporter read the last part of the last previous answer, as follows: "In what percentage that would cost, you heard it said the other day it might cost two or three times as much. I think that is very possible." and the last previous question.)

The Court: I think under the Court's position here the term "figure" might be objectionable. There is no objection to your asking the extent of the cost, in his opinion, with the understanding that it is only an approximation.

Mr. Olson: I'll reframe it. I wasn't trying to find out a figure, because I know this witness won't——

The Court: I didn't think you intended to elicit a dollar and cents figure.

(Testimony of Lawrence E. Bufton.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Bufton, referring back to the last part of your answer, where you said you thought it was entirely possible as to those limits of two to three times, will you state what is your own personal opinion, based on your experience and your knowledge of this type of work, as [1285] to what the increase would be?

Mr. Holman: The same objection.

The Court: The record will show the same objection to this as to the prior question.

Witness: That's a terribly hard question to answer.

Q. You understand I'm not asking in dollars and cents.

A. No, I'm not trying to answer it in dollars and cents. I'm not even going to try. Well, this job, with this short explanation I think is correct, this job resolved itself into purely a labor and equipment job; I mean the sub-contractor furnished nothing except a few kegs of nails and some tie wire or something. If this job were one where there would perhaps be as much materials involved as there was labor, the percentage would be greatly different, but it is awful easy to increase your labor cost which would apply on this case, and your equipment cost, from two to three times. I'll let my answer remain two to three times.

(Testimony of Lawrence E. Bufton.)

Q. Now, what in your opinion, Mr. Bufton, would be the effect, if any, of the carrying this job over through the winter of 1944, that is, the '44-'45 winter, rather than getting the job all performed during the summer months?

A. It is always disastrous to carry a construction job over through a winter. [1286]

Q. Will you explain the reasons of why you say that?

A. Well, you have to practically reorganize your job again, and attempt to pour concrete again, maybe have to heat your water, and maybe your aggregates; have to protect it from freezing. The expense of working through a winter is terrific as compared with working through a season under good weather conditions.

Q. Would it be any different in carrying a job of this type over the winter of 1944-1945, say, compared with one of the previous winters we have had, Mr. Bufton?

Mr. Holman: Just a minute. I submit he has not been qualified yet as a weather authority too.

Mr. Olson: I was afraid that's what counsel would think I was asking about. I'm trying not to ask a leading question. I'm not asking about the weather.

The Court: I don't see where the question would be proper at the present time. I'll sustain the objection.

Q. Having in mind the question I just asked, Mr. Bufton, with special reference to the prevail-

(Testimony of Lawrence E. Bufton.)

ing wage scale, is there any difference between the wage scale that particular 1944-1945 as compared to previous——

Mr. Holman: I submit that is an improper question that counsel is asking after your Honor has sustained the objection to the previous question; “having that [1287] question in mind”; he goes on regardless of your Honor’s ruling.

The Court: I think counsel is just trying to direct him. I though he had weather in mind, and he had high wages in mind. I don’t know that it’s been brought out whether this man knows the wage scale.

Mr. Holman: I have this brief objection——

Mr. Olson: I’ll withdraw the question.

Mr. Holman: Very well. I was going to say the contract was in that time, not some other time.

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Bufton, there has been some reference made to the unavailability of lumber of this type. Now, you referred to the job down in Oregon, the Reclamation job similar to this one. Do you know whether or not lumber was available on that job?

Mr. Holman: Oh, may it please the Court, I object to that question. That’s a comparison between separated areas, and it just can’t serve a useful purpose.

The Court: When was that?

(Testimony of Lawrence E. Bufton.)

Mr. Holman: 1946, your Honor.

Mr. Olson: When was that?

Witness: The job in central Oregon was started in November, 1945. The completion date set for that job was April 30, 1946, in the specifications, I mean. [1288]

The Court: Well, I'm inclined to think that the conditions are not sufficiently similar to indicate the market for lumber on this job, in time and place both. I'll sustain the objection.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Bufton, there is also some reference in the testimony to the weight of concrete in this type of structure, as to whether or not there would be any settling of the concrete structure after it was placed in the excavation. What is your opinion as to whether or not such a settling would take place?

A. You could take a column of concrete a foot square, twenty feet high, and set it on that ground out there, if it was undisturbed, and it would not settle.

Q. Would there then, in your opinion, be any settlement of these concrete structures in the excavations such as took place out here on this 1062 as you have observed it?

Mr. Hawkins: Your Honor, if I understand that question correctly, counsel is referring to settling

(Testimony of Lawrence E. Bufton.)

that took place out there on this job 1062. I don't believe there is any evidence of that. Is that your question?

Mr. Olson: I don't think there is either, but then counsel interrogated at some length as to whether or not this concrete would settle some three or four inches and take care of this high grade, unless I mistook [1289] your purpose.

Mr. Holman: He did, your Honor. He mistook our purpose, naturally.

The Court: I'll overrule the objection.

(Whereupon, the reporter read the last previous question.)

Witness: No.

Q. Now, do you know, Mr. Bufton, whether or not during the year 1944, between March, 1944, and continuing on to the next year, lumber of the type used in these forms was available or obtainable with a priority?

Mr. Holman: Just a minute. May it please the Court, the witness has already shown that he's a resident and has been an operator in Oregon, and not up here, during that period at all. It is not proper.

The Court: I think the lumber market is general enough in the Northwest here so that he can answer. I'll overrule the objection.

Witness: No question but what lumber was hard to get at that particular time. Priority, of course, would help. The priority on a contract of this sort

(Testimony of Lawrence E. Bufton.)

should have been high, and I think a great deal depended upon what efforts you made to get your lumber.

Q. A great deal depended on what?

A. Depended on what effort was made to get the lumber. A [1290] great deal would depend on what effort was put forth to get the lumber.

Q. Well, supposing that diligent effort was put forth to get the lumber, and the man had a priority; through knowledge of the lumber market, based on your experience, do you think lumber of this type could have been obtained for this project?

Mr. Holman: It seems to me that is purely speculative for this witness. It can't be factual.

The Court: I'll overrule the objection.

(Whereupon, the reporter read the last previous question.)

Witness: I think perhaps with some difficulty it might have been obtained, yes.

Q. Now, did you also go over the specifications—I don't mean the specifications—the completed structures on 1068?

A. Yes, I went over the area and stopped and observed a number of the structures on it.

Q. And was that the same time that you examined 1062? A. Same day, yes.

Q. Did you also examine the location of the aggregate stockpile on that job?

A. Yes, I was there.

(Testimony of Lawrence E. Bufton.)

Q. And were those structures of the same general type as [1291] those on 1062?

A. They were.

Q. Having in mind your inspection of the completed structures on job 1068, specifications 1068, and the location of the stockpile with reference thereto as you observed the location, and assuming that the excavations for the structures were to be made by a prime contractor, and assuming that the excavations were made to a lateral clearance at the foundation of the structure of one foot outside and all around the outside line of the concrete, and assuming further that the banks from the foundation of the excavation to the surface of the ground was sloped to a 1 to 1 slope on the banks where outside panels were to be placed to form a structure for the concrete, and assuming further that the floor or foundation of the excavation was so excavated as to be in a position to receive concrete in accordance with the structures as you observed them, and the specifications, and assuming that the excavations were furnished and completed far enough ahead of the concrete work so that the contractor inserting the forms and pouring the concrete could proceed without being delayed, and assuming further that the form lumber was being furnished by the prime contractor and was furnished on time and of a proper quality and as needed by the sub-contractor making the forms, and [1292] assuming further, Mr. Bufton, that the operations to be performed by the sub-contractor on 1068 consisted of

(Testimony of Lawrence E. Bufton.)

furnishing all labor and necessary equipment to do all of the concrete work, form work, structural timber work, cut, bend and install all re-inforcing steel, all such work as shown in the plans and as specified in specifications number 1068, Roza Division, Washington, the sub-contractor to clean all concrete forms, remove nails from the same, and pile the same in neat piles, and all forms and form lumber upon completion of the job to remain the property of the general contractor, the work to be done in strict accordance with the plans and specifications, government inspection to the satisfaction of the general contractor, and all materials except the wire, nails and curing materials would be furnished to the sub-contractor, sub-contractor to furnish the above wire, nails and curing material, and the general contractor to furnish the lumber; and then assuming that the sub-contractor was to be paid \$28.00 per cubic yard for the concrete installed, 2 cents a pound for the re-inforcing steel in place, gates and miscellaneous work to be paid 3 cents per pound in place, and \$35.00 per thousand board feet of structural timber in place, and assuming that the bridges referred to consisted of two small bridges of about 4000 board feet each as shown by the plans and specifications covering [1293] 1068, and assuming further that the total cubic yards of concrete required in the pouring of the structures on 1068 was 1458.339 cubic yards, what in your opinion would be the fair profit, if any, which would or should be realized by the sub-contractor in performing that work?

(Testimony of Lawrence E. Bufton.)

Mr. Holman: I object to that question, your Honor, as having in it many elements of speculation, leaving from it many elements essential to determine the operating cost, many elements omitted with respect to the relative performances between the principal contractor and the sub-contractor, and in addition, I submit that the question is not a proper question, because under the evidence as it now stands before your Honor, the notice of termination was in advance of any excavation, and therefore if there was a termination the matter of subsequent excavations no longer became a matter of any concern or of any right in M. C. Schaefer or the Concrete Construction Company as a sub-contractor.

Mr. Hawkins: I have the further objection, your Honor, that the question of profit is not one that's properly a matter of expert opinion. This witness may be qualified to testify as to the costs, and then it would be for your Honor to make that deduction and arrive at the profit. I submit that that type of question is not properly propounded to an expert.

The Court: The contract here specifies the unit price, of course, doesn't it?

Mr. Olson: Yes, your Honor, and I have specified it.

The Court: And you've specified the amount of yardage?

Mr. Olson: Yes.

The Court: So what you're asking him to do is find what it would cost to do that, and then sub-

(Testimony of Lawrence E. Bufton.)

tracting it from the total allowance is what it would amount to.

Mr. Olson: That's the effect of it.

The Court: I assume this pre-supposes, as in your other question, an experienced and competent contractor?

Mr. Olson: Yes.

The Court: I don't know whether you included that or not.

Mr. Olson: No, I did not, your Honor.

Direct Examination
(Continued)

By Mr. Olson:

Q. In the question there, having in mind that by the use of the term "sub-contractor" I mean a capable and experienced sub-contractor.

The Court: I'll overrule the objections. He may answer.

A. If I can refer to what I looked at a while ago, the [1295] contract; I'm thinking out loud now, if I may.

Mr. Holman: I object to the witness thinking out loud, your Honor.

The Court: Yes, just answer the question, if you can.

Mr. Hawkins: Your Honor, I further object to the witness reading from a memo. I think the rule is that the witness may refresh his recollection, but no more than that.

(Testimony of Lawrence E. Bufton.)

The Court: Yes, that's true. You may use the paper that you yourself prepared to refresh your recollection, but don't read from it.

Mr. Holman: May it please the Court, the witness has already shown that this is not for the purpose of refreshing his recollection, but it is his computation, and it is his computation he made outside.

The Court: Well, I assume an engineer doesn't get these figures right out of the air. If he's figured them, and that is his own figures, I have no objection to his referring to them to refresh his memory or guide him in making his estimate.

Witness: Well, considering the one job alone, that's job 1068, we're talking about, I understand, considering that job alone, the difference in the cost would be so slight that I can't estimate it, I don't think. There [1296] might be some little difference in length of haul that might affect it slightly, but the re-inforcing steel and the gates and metal was placed under the one contract in the contract unit price, and in this one you just read me there it assumes that the contractor will be paid in addition for that. I would say that the cost under those circumstances, for the concrete, without going into what might be made on the small amount of re-inforcing steel or other material, would be \$27.25, which I have estimated would cover home office, general supervision, and a margin——

Mr. Hawkins: Your Honor, I move that answer be stricken as not responsive to the question.

(Testimony of Lawrence E. Bufton.)

The Court: It isn't responsive. I assume that the \$27.25 is the cost.

Witness: Yes, I've made a calculation there of a few cents to cover the items that weren't in this contract 1068 that were in 1062.

The Court: Well, the answer isn't responsive. The question was for profit, and he has stated the price here.

Mr. Olson: No, it is not, your Honor.

Mr. Hawkins: And I also understood the witness to say that this included a margin, of profit, I assume.

Mr. Olson: Yes, it does. I have no objection to [1297] the answer being stricken.

The Court: Yes, it isn't responsive. It will be stricken, and you can start again.

Direct Examination
(Continued)

By Mr. Olson:

Q. What I'm asking you for, Mr. Bufton, on my hypothetical question, is, in your opinion, assuming that the facts are as stated in my hypothetical question, and that the contractor was experienced and able and received the prices which I mentioned in my hypothetical question, and assuming the yardage, the cubic yardage of concrete, as I gave it to you, how much money would it be, if any, in dollars and cents, that he would receive over and above what his actual expenses that he would have to pay out would be, not taking into consideration on his

(Testimony of Lawrence E. Bufton.)

pay-out expenses his own services or supervision, but the difference in dollars and cents between the amount he would receive under that contract, and the amount that he would be required to pay out for labor and materials and equipment?

A. What was the concrete price again, per cubic yard?

Q. \$28.00 per cubic yard, concrete installed.

A. What were the prices on the other units there?

Q. 2 cents per pound for re-inforcing steel in place, gates and miscellaneous iron work, 3 cents per pound in place, \$35.00 per thousand board feet of structural timber in [1298] place.

Mr. Hawkins: While the witness is making the computation, I would like to make this objection, your Honor, that there is no testimony here of the amount of steel required on 1068 or used on 1068. This witness testified he was out to the scene of 1068 within the past week or ten days, and of course it would be impossible to tell from the structures as they now are how much steel was installed. I don't see how anyone could answer that question.

The Court: I don't know, of course, whether that is shown in the structure layout or any of these documents in evidence. Is the amount of steel shown here any place, used on 1068?

Mr. Hawkins: And I assume that the other reasons I stated with reference to the previous question will also apply.

(Testimony of Lawrence E. Bufton.)

The Court: Yes, the record may show that as to all of the defendants, that the same objection goes as to the renewed question.

Mr. Olson: Well, I think it appears, your Honor. May I have the specifications on 1068?

Q. I am handing you, Mr. Bufton, plaintiff's Exhibit 4, which are the specifications on 1068.

Mr. Holman: As corrected, counsel, or not?

Q. No, and also handing you plaintiff's Exhibit 62, showing the final payment quantities with reference to each item shown on the specifications.

A. Well, I'm not interested in quantities in this. I'll take the quantities in the final.

Mr. Olson: Your Honor, if it will conserve time, if counsel wants to proceed with his other cross-examination, the witness can examine that during the recess.

The Court: Well, if it doesn't take too long, he can do it now.

Witness: It won't take but a second here. I can get it here by number. There's something definitely wrong the way this thing's made out here.

Mr. Hawkins: What was that?

A. There's something definitely wrong with the way this is made out.

Mr. Hawkins: What are you referring to?

A. I'm referring to this exhibit here.

The Court: That will be stricken. It isn't in response to any question. What document has he got there, the final estimate?

(Testimony of Lawrence E. Bufton.)

Mr. Olson: The final estimate and the specifications giving estimated quantity. The witness may perhaps be confused. The ink notations on 1062 are to be entirely disregarded, have nothing to do with this exhibit and we [1300] should have those deleted.

Witness: I would estimate that there would be a \$7900.00 margin, out of which you would have to collect home office and general supervision expense.

Mr. Olson: You may examine.

Cross-Examination

By Mr. Holman:

Q. Mr. Bufton, in your consideration of the specifications you said that you read them?

A. Yes.

Q. What specifications did you take into consideration in determining that a slope should be 1 to 1?

A. I'll read it, if you like.

Q. I don't ask you to read it. I ask you what one it is.

A. I'll give you the page number. Page 22, paragraph 47, is that right? I've heard it referred to several times.

Mr. Olson: I think he's entitled to refer to the specification.

Mr. Holman: He may do so.

Mr. Olson: You said he couldn't.

Mr. Holman: He said he'd read it.

A. There is something in here I think you will want to bring out.

(Testimony of Lawrence E. Bufton.)

Q. There is something you think I'll want to bring out, you say?

A. I can make my answer better referring to this. [1301]

Q. I asked you what number.

A. All right, paragraph 47, page 22.

Q. Only? A. In the specifications.

Q. The only one you considered, sir?

A. On the excavation, I'm talking about.

Q. Yes, sir; that the only one you considered?

A. It covers the excavation very thoroughly, I think.

Q. Is that the only one you considered, sir?

A. I'll say so, yes.

Q. All right. Thank you. Did you at any time see any operations on the Roza Project of which this 1062 is a part?

A. Not except these two, not under construction.

Q. That's what I mean, operations?

A. That's right.

Q. You didn't see any operations, sir?

A. No.

Q. Did you take into consideration that there was a back fill item? A. That's pay item.

Q. Sir? A. Back fill as a pay item, sure.

Q. Did you take that into consideration in your answer to counsel in chief. [1302]

A. Why, surely. It's a pay item there, it stands for itself.

Q. Then your answers include determination of that, do they?

(Testimony of Lawrence E. Bufton.)

A. I would say that the back fill there is a pay item which is described in a way, it is prescribed in the excavation specification there, in that the engineer of the Bureau of Reclamation will not measure for back fill, likely, any more than the 1 to 1 slope. In other words, if you take out more than the one to one slope, that part that you put back in there, you'll not get paid for as back fill.

Q. How many times did you read or study this specification here?

A. I've read it through two or three times.

Q. And you say that the back fill item is in Section 47?

A. That Section 47 there as it determines how the engineer is going to figure the back fill of a certain part of that section, there. Now, I don't claim that does all of it. There will be places around these structures where there will be back fill placed higher than the original ground was.

Q. Yes, sir. Did you read anything in the specifications with respect to roads?

A. With respect to roads?

Q. Yes, sir. A. I don't recall. [1303]

Q. Sir? A. I don't recall them perfectly.

Q. You recall no provision with respect to roads?

A. I don't call it to mind right now, no.

Q. Did you read the principal contract?

A. Did I read the principal contract?

Q. Yes, sir.

A. You mean the ones written by the engineers?

(Testimony of Lawrence E. Bufton.)

Q. You know what the principal contract is, do you not?

A. The principal contract is the contract between the prime contractor and the Bureau of Reclamation.

Q. Yes, sir; you read that contract, did you?

A. Yes, sir.

Q. And you read the specifications?

A. Yes.

Q. All right. Did you read specification 70?

A. If I did, I don't recall it.

Q. Pertaining to forms?

A. I don't recall it by that number.

Q. Can you tell me from your best recollections with respect to the specifications covering forms—

A. Covering forms?

Q. Yes, what that specification is?

A. Well, I probably skimmed through that very hastily, having read so many of them in my life.

Q. You don't have that fixedly in mind, do you, sir?

A. I know what's required on forms without reading the specifications.

Q. You don't know or have fixedly in mind what these specifications require as to forms as covered by paragraph 70?

A. I don't have it particularly in mind right now.

Q. Did you read specification 72 with respect to placing concrete?

A. I read it through, yes.

Q. What does it say, from your memory?

(Testimony of Lawrence E. Bufton.)

A. Oh, just the usual specification on placing concrete, that the concrete shall be placed in the forms in such manner as not to—well, in a finished manner.

Q. Was the provision in this specification with respect to placing concrete the same in substance as the one you used in experting the Deschutes job you spoke of? It was Deschutes, was it not?

A. It was very likely the same contract.

Q. You gave a specification number there, did you not, sir?

A. I went over that job, but I wasn't particularly interested in the specifications of the concrete, but I saw the concrete placed over there.

Q. Pardon me, I thought you even called the specifications on this Deschutes job?

A. Specification 1100, yes. [1305]

Q. And that you were familiar with those, and they were much the same as these?

A. Yes, similar project.

Q. In other words, you are familiar with the Bureau specifications?

A. Yes.

Q. Then what is the specification with respect to placing concrete, by your memory?

A. Well, concrete placed in the proper manner.

Q. What is the proper manner, sir?

A. The proper manner, the engineer will determine that you put in a given amount of water, not too much water, and the concrete is placed in a manner that will not distort the forms, and then finished in a certain manner that they specify.

(Testimony of Lawrence E. Bufton.)

Q. What was the mix ingredient on this job 1062? A. Sand, gravel, cement and water.

Q. Yes, what proportions?

A. What was the mix?

Q. Yes.

A. I'm not concerned what the mix was, because the cement and sand and gravel was furnished by the Bureau of Reclamation.

Q. You didn't look that up?

A. I say, I'm not even concerned with it. [1306]

Q. Did you look it up?

A. No; I know about what the mix would be.

Q. I want to know with respect to this job. Then with respect to the measurement of concrete, specification 77, what do you have in mind with respect to that?

A. Concrete will be measured on the inside of the forms to the neat measurements of the structure as designed.

Q. That's what you think 77 provides, sir?

A. That's the way it would be measured, yes, sir.

Q. And with respect to payment of concrete, specification 78, you read that, did you, sir?

A. They pay on the price, you're paid on your bid per cubic yard.

Q. Pardon me, sir, did you read 78?

A. I went through them very hurriedly; I can't recall.

Q. Mr. Bufton, on your standing here as an expert at present, did you read and study 78?

A. I did not.

(Testimony of Lawrence E. Bufton.)

Q. And did you read or study 77?

A. I did not; I know what they are so well I don't have to read them.

Q. Did you read or study 72?

A. I did not.

Q. Did you read or study 70?

Mr. Olson: It's hard to understand counsel's [1307] questions when he's pounding the table. I'm having trouble understanding them.

The Court: Well, proceed.

Q. I think the witness and I are getting along very well. Did you read and study specification 52, installing——

A. No; I know so much about it I didn't waste any time on it.

Q. Did you read and study specification 29, roads? A. No, I maybe slipped there.

Q. Did you read and study specification 26, materials to be furnished by the contractor?

A. Yes.

Q. What materials were to be furnished by the contractor, prime contractor?

A. Materials furnished by the prime contractor?

Q. Yes, sir.

A. That will be all materials except those that remain in the finished structure. Do you know what I mean? All the materials that remain in the finished structure.

Q. Is that what Section 26 says, sir?

A. Yes.

(Testimony of Lawrence E. Bufton.)

Q. All right; you studied that section, did you?

A. Yes, I know what is there.

Q. Did you read and consider specification numbered 24, [1308] liquidation damages, delay?

A. No, I didn't read that.

Q. You say you went on to 1062 and 1068 with Mr. Darcy, Mr. Waltie, who was here, and Mr. Schaefer. Which Schaefer? A. M. C.

Q. M. C.; when?

A. A week ago last Saturday; that would be February 22, I think.

Q. That would be the 28th?

A. February 22, I'm quite sure.

Q. It was either the 29th or the 22nd, a week ago last Saturday, sir?

A. A week ago last Saturday.

Q. I think you're right, the 22nd, yes. Now, did you find back-filled operations performed on the structures you inspected?

A. I don't quite get that, Mr. Holman.

Q. Did you find back-fill operations performed on the structures you inspected?

A. Yes, yes, they were completed.

Q. What lateral were you on?

A. I couldn't tell you that by number.

Q. Why can't you?

A. Because we didn't follow the map through.

Q. You didn't consult the area map as to laterals? [1309]

A. Not as we went over the job.

Q. That was not with you?

(Testimony of Lawrence E. Bufton.)

A. They had the map in the car, I presume, but the boys would say "this is structure 18, 27" and so forth.

Q. You did not look at the lateral?

A. I looked at the completed structures.

Q. Can you tell me how the laterals are detailed, what determines the number?

A. Certainly I can.

Q. What is it?

A. They've got 59 something or other, then they have laterals A and B and so forth. Ask me to find a structure; I'll find it.

Q. All right, sir; what does 53.7 mean, in reclamation? A. That's mileage.

Q. Mileage on what? A. From a point.

Q. From what point?

A. I don't know what point in this case.

Q. You don't know what point, sir?

A. Not in this case; probably from the head-works.

Q. How much time did you spend in experting the Deschutes job? A. Four or five days.

Q. And did you have mileage designations on those laterals? [1310]

A. Yes, sir, certainly. I was trying to figure out for the bank whether the contractor was making money or not. I had access to his costs.

Q. Pardon me for interrupting you, but the thing I am interested in is whether or not you knew the lateral numbers on these jobs.

A. Why, yes.

(Testimony of Lawrence E. Bufton.)

Q. What laterals were you on, then, sir?

A. We drove over the roads; who could ever remember?

Q. What laterals were you on?

A. I don't know.

Q. And you didn't inquire, sir?

A. I looked at structures of a certain type, and I'm sure I looked at every type that was built, and I am sure I couldn't go out and find them now; neither could you.

Q. Never mind me, it's you I'm questioning. Did you look at an area map?

A. I looked at an area map, yes, sir.

Q. Now, can you tell me from the area map what laterals you were on?

A. If you let me look at the area map I can.

Q. No, did you look at the area map out there?

A. Why, certainly.

Q. Or did you look at such structures pointed out to you by these gentlemen? [1311]

A. I looked at the structures pointed out to me; told me where they were and what they were.

Q. Did you look at the right of way, sir?

A. In a general way, yes.

Q. Why did you do that?

A. I wanted to know how far it was from the central batching plant, and so forth; calculate the average haul.

Q. Mr. Bufton, I understood counsel in his questions to you that you had been to the batching plants?

(Testimony of Lawrence E. Bufton.)

A. I was at the batching plant; I was at the site of both of them.

Q. How far was the batching plant on 1062 from the first operation on 1062?

A. I couldn't tell you that exactly. I figured the average mile haul from the batching plant to all of the structures on 1062 was from $8\frac{1}{2}$ to 9 miles.

Q. $8\frac{1}{2}$ to 9 miles, average haul?

A. That's right.

Q. How did you determine that, sir?

A. From the distance it was from one end, and the haul roads; I wouldn't say that was within a quarter of a mile of being correct, by any means.

Q. No, I understand; a quarter of a mile; which lateral are you talking about?

A. I'm talking about this main lateral, 53.7 or whatever it [1312] is.

Q. I'm asking you, you're talking about the main lateral, which is the main lateral?

A. I don't know, then.

Q. How many structures did you inspect?

A. Oh, probably——

Q. Not probably, sir. How many?

A. I didn't count them.

Q. Did you make notes of the structures you inspected?

A. I didn't make a note of the laterals or structures I inspected, no, I did not.

Q. Did you make notes of the types of the structures you inspected?

A. Mental notes.

(Testimony of Lawrence E. Bufton.)

Q. No, not mental notes; notes on paper?

A. No notes on paper.

Q. The only notes you have made are the computations you have made for these hypothetical questions, isn't that correct?

A. I didn't get the question.

(Whereupon, the reporter read the last previous question.)

A. Not at all.

Q. Do you have any other notes?

A. I had to make other notes to see how many square feet of [1313] form surface; I figured—I went over the map and I figured the length of miles and so forth, from information I had in my mind.

Q. Yes, sir, but did you make any field notes?

A. I didn't make any field notes, no, sir.

Q. Yes, sir; now, your experience as detailed, sir, started out with present operation of a silica plant.

A. That's right.

Q. Where is that? A. Eugene, Oregon.

Q. And how long have you been operating that?

A. Two years.

Q. As owner? A. As principal owner.

Q. A silica plant is for what purpose?

A. Making sand for foundries and other purposes of the sort.

Q. And what is your daily capacity there, sir?

A. Beg pardon?

Q. Daily capacity? A. 50 tons.

The Court: We'll recess now for 10 minutes.

(Short recess.)

(Testimony of Lawrence E. Bufton.)

(All parties present as before, and the trial was resumed.) [1314]

Cross-Examination

(Continued)

By Mr. Holman:

Q. Mr. Bufton, in your computations with respect to your idea of the appropriate unit for concrete on specification 1062, what numbered item of the bid did you consider? A. 1062?

Q. Yes, sir.

A. Just the items that were under discussion here.

Q. What ones?

A. Well, there was concrete, re-inforcing steel, metal gates, and miscellaneous metal work. That was all.

Q. Now, what specifications did you consult, the ones which are in evidence, or did you have other copies? A. I didn't see an addenda.

Q. Sir? A. I didn't see an addenda.

Q. What specifications, the particular copy, did you consult, the ones Mr. Schaefer had or the ones that are in evidence?

A. The ones that he had.

Q. They were on the job with you when you inspected? A. They were.

Q. In your determination of those bid units fixed by you as reasonable for concrete, you used the term "concrete", did you?

A. That's right.

(Testimony of Lawrence E. Bufton.)

Q. What do you mean by concrete? [1315]

A. Well, the materials that are combined, sand, gravel, cement and water, which set up into a stone-like mass, is concrete.

Q. Actually you meant the unit of placing the concrete and the aggregates which is furnished by the government, did you not, sir?

A. Placing them as directed by the Project Engineer, in forms.

Q. By the chief engineer, the engineer in charge?

A. Well, the engineer or his authorized——

Q. Getting back to your one foot square and twenty foot column of concrete having no pressure at the base——

A. I said it wouldn't settle. I didn't say it would have no pressure.

Q. There would be a pressure, would there?

A. There would be a pressure.

Q. A considerable lateral pressure, side wall pressure?

A. That's the very way they test soil; they don't do it with a column of concrete.

Q. There would be considerable lateral pressure, would there not?

A. Just what do you mean by lateral pressure?

Q. Sideways.

A. The earth could hold that up there.

Q. That goes down to China. How about the sideways? [1316]

A. Wouldn't be sufficient so it would crack or spread out, on this soil here, I'm talking about. If

(Testimony of Lawrence E. Bufton.)

you put that on a soft soil, the concrete would go down into it, and the sides would crack.

Q. What is the relative characteristics of the soil on the portion of 1062 that you were on, and 1068? Are they comparable?

A. Very much so.

Q. Same general ingredients?

A. Very much so.

Q. And you being a silica man are entirely familiar with sand?

A. Yes, I know what sand is. They call this Lowe-S, that's a geological name for it.

Q. That is a general classification for all of this type, whether it is ash or sand or has vegetable component?

A. Yes.

Q. Did you make any excavation while you were in the field in any of the soil with any kind of an implement?

A. I did not. There is some gravel out there.

Q. I'm talking about you.

A. No, I didn't make any excavations.

Q. In getting back again to your units you fixed as reasonable for the concrete, did you determine as to whether or not there was any percentage of excess to be considered? [1317]

A. Well, there would be excess to back fill, because it takes more dirt to fill a hole than comes out of it.

Q. I'm talking about concrete.

A. There are certain places, perhaps, where there would be an excess of concrete, because if there was a rock wall or something of that sort you

(Testimony of Lawrence E. Bufton.)

would fill to that rock wall. In other words, you wouldn't try to form it.

Q. Did you consider excess of concrete?

A. The engineers estimate the quantity of concrete.

Q. Yes, as the normal job run. Now, did you consider excess of concrete?

A. As the job runs, the concrete is measurable.

Q. Yes. Did you consider excess, percentage of excess?

A. Well, I heard a man say on the stand here—I just don't know what you're getting at, to tell you the truth.

Q. Never mind what I'm getting at. Answer the questions.

The Court: Do you understand the question?

A. Yes. Nearly always it will take more concrete to do a job than——

Q. Yes, and what did you consider?

Mr. Olson: I'm going to ask counsel to wait for the next question until the witness gets through. Invariably the last ten or fifteen words are superimposed.

Mr. Holman: I just don't mean to offend, naturally.

A. Mr. Holman, I can tell you—— [1318]

The Court: If the witness will try to answer counsel's questions here directly, and then talk one at a time, we'll get along better. If there are explanations to make Mr. Olson, I assume, will bring them out. Just answer counsel's questions if you can.

(Testimony of Lawrence E. Bufton.)

Cross-Examination
(Continued)

By Mr. Holman :

Q. I want to know what percentage of excess in concrete you considered in arriving at this bid price you gave counsel.

A. I didn't take any into consideration.

Q. Why not?

A. I just don't take it into consideration, that's all.

Q. It has to be handled, doesn't it, sir?

A. It has to be handled, yes, if there is any excess. If a man makes up concrete that's not placed in the form he's not going to be paid for it. If he does that excessively, no doubt the government will charge for the materials in it. There is probably a little waste at the end of the day, 'most every day.

Q. That has to be handled, does it not?

A. Surely.

Q. What will that run for a job of this size, in percentage?

A. I wouldn't say over 2 per cent, maybe.

Q. And anything over 2 per cent would be excessive, would it?

A. I would think so.

Q. Would you say that 14 per cent would be wasteful, sir? [1319]

A. I don't know where it happens.

Q. Would you say that would be wasteful, sir?

A. I couldn't explain why it wouldn't be, no.

Q. Would you say it would be wasteful, sir?

(Testimony of Lawrence E. Bufton.)

A. There might be some reason for it. Where do you get the 14 per cent, may I ask?

Q. Let's say 12, so you don't worry about it.

A. Why do you ask me 14, or 12 per cent, either one?

Q. What difference does it make?

A. Is that something that's come up between the engineer, the final payment? I just don't follow it.

Q. Will you please, as an expert——

A. I told you there wouldn't be over 2 per cent.

Q. Having fixed the unit price, tell me whether or not 14 per cent of excess cement——

A. I think I've answered the question.

Q. Let me finish my question, now—is indicative of unskillful operation?

A. I think that when I answered the first question I gave the only answer I could, that there might be 2 per cent waste.

Q. I'm talking about excess; you understand what I mean, sir?

A. Well, you mean excess or waste.

Q. Yes, sir. Now, what percentage of spillage did you consider?

A. Well, I'm talking about spillage. [1320]

Q. Oh, you're talking about spillage?

A. Yes, or you might have a half a yard in your mixer at the end of the day that you couldn't place anywhere, there wasn't any place to place a half a yard. You try to measure it as close as you can when you're batching.

(Testimony of Lawrence E. Bufton.)

Q. Well, all right. What is the fair percentage of skillful operation for wastage?

A. Well, say 5, then; I'm thinking about spillage.

Q. And not very much more than that?

A. That's right.

Q. Very much more than that would indicate something wrong?

A. Well, carelessness, perhaps.

Q. It would indicate carelessness, would it not? In answering your hypothetical question to counsel, did you or did you not take into consideration the perfection or the imperfection of forms themselves?

A. Yes, with the equipment that they had, those cone nuts, which make a spreader and a tightener, you can make your forms very, very close.

Mr. Holman: I move that answer be stricken as not responsive. That isn't what I asked him at all.

The Court: It will be stricken.

Q. What I'm asking you, Mr. Bufton, is whether or not in answering counsel's hypothetical questions you considered the forms might themselves be defective? [1321]

A. No, I did not.

Q. And if they were defective would that change your answer?

A. Well, if the forms were defective it certainly would.

Q. All right, sir. Did you make inquiry to ascertain whether or not the forms were defective?

A. I don't know who I might have inquired from.

(Testimony of Lawrence E. Bufton.)

Q. Now, please tell me, did you or did you not?

A. No, I didn't.

Q. Did you consult government records as to excess of concrete? A. I did not.

Q. Did you determine from any records whatsoever that there were vertical cuttings on the job in question, or did you assume that from what you heard?

A. Vertical cutting of what, a bank, do you mean?

Q. I'll make it explicit, sir.

A. Pardon me; maybe I'm dumb.

Q. I don't think you are, sir. What I'm talking about, of course, is excavation.

A. There are vertical banks that are prescribed in these specifications.

Q. Yes.

A. Yes. As to how the banks they're talking about, as being sloped 1 to 1, or vertical, I only have hearsay for that. [1322]

Q. Yes, I understand that, sir; and as to the distance of the bank out from the base of the neat line of the concrete, pay quantity, is that based on hearsay too, sir?

The Court: This witness never testified, did he, that the banks were vertical or what the slope was?

Mr. Holman: I'm trying to find out what he investigated.

The Court: Well, how could he investigate as to whether the slope was one to one? He just examined it ten days ago, didn't he? I can't see any purpose at all in this line of examination.

(Testimony of Lawrence E. Bufton.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. You say that a job which carries through the winter is a more expensive operation? A. Yes.

Q. Than one that carries through the construction months? A. Yes.

Q. Is it or is it not good practice to suspend operations in the months of May, June and July, in the Pacific Northwest area, including the Roza Project? A. I would say no.

Q. And if work is suspended during that period, it is reasonable to contemplate, is it not, that it will have to be done in the worst months, the more unfavorable months? [1323]

Mr. Olson: Your Honor, that's asking for a conclusion of the witness.

Mr. Holman: Well, I'm talking about a job this size.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: Your Honor, you see, the first question was——

Mr. Holman: I'll strike the question. I think it is argumentative, your Honor, and I didn't mean to make it so.

(Testimony of Lawrence E. Bufton.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Did you determine what priority for lumber was involved on 1062?

A. I had so many of those numbers in my mind at one time, I haven't any idea what they are now. I did not.

Q. You had been told for these jobs the priority, had you?

A. No, I don't know what the priority was.

Q. And when your answer was that if they had priority, you meant a top priority, did you not?

A. Not necessarily. I say that priorities helped. I didn't say what priorities.

Q. They would help you, sir, and you recognize that priorities at that time were necessary? [1324]

A. Yes, I did.

Q. Did you know from your investigation in connection with your testimony here on this stand, or from your investigation in connection with your experting the Deschutes job which you mentioned, that during the interim while 1062 and 1068 were in progress there was a shortage of lumber?

A. Certainly there was.

Q. Yes, sir; and that there was a withdrawal of requirement of kiln-dried lumber on all public jobs, did you know that, sir?

A. Well, that means you couldn't get air dried lumber.

(Testimony of Lawrence E. Bufton.)

Q. Yes. Withdrawal of the requirement. You've had a lot to do with contracts, haven't you?

A. Yes.

Q. Wasn't that waived, sir?

A. I don't know whether that was true or not, sir.

Q. You didn't know anything about that, sir?

A. No; during that period of time I didn't buy any kiln-dried lumber.

Q. Now, getting to 1068, Mr. Bufton, how many structures on 1068 did you inspect?

A. I can't tell you what number.

Q. How many laterals were you on on 1068?

A. I can't tell you that.

Q. Can you tell me the numbers of any of the laterals? [1325]

A. I cannot.

Q. How long were you on 1068?

A. I said that I was on the two jobs about six hours.

Q. Yes; how many of the six hours were you on 1068?

A. Well, I think probably two and a half of the six hours.

Q. Two and a half of the six hours, on 1068?

A. Yes.

Q. And the rest of the time, three and a half, would be on 1062?

A. I think so. We went over and looked at the chute.

Q. How did you know you were on 1062?

A. Because they told me I was.

(Testimony of Lawrence E. Bufton.)

Q. How did you know you were on 1068?

A. They told me I was.

Q. No government engineer located you on there? A. No.

Q. Then so far as you are concerned it could have been 1062-2 or 1101 or some other specification, could it not?

Mr. Olson: I think that question is argumentative, your Honor. He answered the question.

The Court: Yes, that is argumentative. Sustain the objection. He said he doesn't know where he was except where they showed him.

Q. Did you have these pictures which are in evidence when you were in the field inspecting, sir?

A. They had a field map which we looked at, and they showed me the general terrain there.

Q. No, I meant these photographs, I think counsel showed you a Mixomobile on the photographs; it is exhibit 49. A. Yes.

Q. You had that with you, did you?

A. I've seen those pictures, yes.

Q. Did you have those with you in the field, sir?

A. I'm not sure we did, sir. It seems to me I did see a picture of someone in the field.

Q. Did you have the series of pictures?

A. Well, he had it in some kind of binder. It may not have been that one.

Q. Do you remember what pictures they showed you? A. No, I don't.

Q. Isn't it a fact they showed you the picture in which a Mr. Hewitt was shown?

(Testimony of Lawrence E. Bufton.)

A. I've seen that picture. I did not see that one out in the field.

Q. And didn't they show you that structure?

A. Well, if they did they didn't mention it.

Mr. Holman: Yes, sir. That's all.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Bufton, I believe you testified that this job 1062 could be accomplished so far as the sub-contractor was [1327] concerned in four months, was that your testimony?

A. That that job should have been done in four months, yes. I answered a hypothetical question, if it is proper for me to qualify it, I answered a hypothetical question when I said four months.

Q. With respect to 1062? A. Yes.

Q. Did you take into consideration in answering that question the roads, or the condition of the roads?

A. Yes, I know what the roads are like in this country.

Q. I meant out there on 1062. A. Yes.

Q. And if in fact the movement of their equipment was held up by the condition of the roads, would that have an effect on your answer?

A. They don't need to be held up.

Q. My question is, if in fact they were held up?

A. Well, I didn't take it into consideration in making my answer.

(Testimony of Lawrence E. Bufton.)

Q. In other words, in making your answer you assumed that they could move their equipment around freely, without difficulty?

A. You take care of your roads so that you can move your equipment. You have a Patrol grader, something like that.

Mr. Hawkins: Will the reporter read my question? [1328]

(Whereupon, the reporter read the last previous question.)

Q. Is that right, sir?

A. Well, there would be difficulty. You would have to prepare your road for it.

Q. Just a moment. I think you can answer that question.

A. You can't take a piece of equipment and drive it through the country as nice as you can on a paved highway.

Q. In making your answer did you assume that that equipment could be moved around freely and without difficulty? A. No, I did not.

Q. In other words, you assumed that they would have difficulty in moving their equipment around, is that right?

A. That's right, there would be some difficulty, yes.

Q. Mr. Bufton, I believe you heard the testimony that this Mixomobile had a capacity of two yards? A. The drum has two yards.

Q. At a time? A. Yes.

(Testimony of Lawrence E. Bufton.)

Q. And a capacity of about 20 to 30 yards per hour? A. Yes.

Q. Is that right? A. Yes.

Q. Can you tell us—well, let's see, first, how many structures were on 1062, if you know approximately? [1329] A. Something over 500.

Q. Something over 500, and there were approximately 1,500 yards of concrete involved?

A. That's right.

Q. That would make approximately three or three and a half yards per structure?

A. If you figure it that way. There is structures like the chute and transition, and so forth, that there was some 300 odd yards of concrete in the structure.

Q. There was 300 yards in the chute?

A. The chute and the transition section, and the settling basin.

Q. All right, you eliminate that 300, that gives you about 1,200 yards for the 500 structures, is that right?

A. Yes, average; I mean, that's the total, yes, should be.

Q. So that you would have approximately two and a half yards per structure?

A. That would be average.

Q. Yes, the average. Now, do you think it is proper to have a machine that has a capacity of 30 yards per hour out there in that area to pour structures that contained only 2 yards?

(Testimony of Lawrence E. Bufton.)

A. Yes, and let me tell you why: That machine is a rubber-tired, self-propelled piece of equipment. They don't make them in a smaller size. If you went out with a piece of [1330] equipment smaller, not self-propelled, you would have more difficulty than you would with this machine here.

Q. You would have to move it with some other vehicle?

A. Yes, it would cost you more than this self-propelled vehicle.

Q. In your opinion it would cost more, is that right?

A. Yes, I've done it, and I know.

Q. Now, if you were handling this job, how many men would you have on the job?

A. Well, if I was going to finish up in four months I'd have to have an average of 25 men.

Q. An average of 25 men?

A. Yes.

Q. And how many men would you have doing carpentry work, building panels at the yard?

A. Well, when I started out I would probably have a fair sized crew, and afterwards, I'd have a crew there of probably three or four men.

Q. And how many men would you have out setting the forms?

A. Setting forms? 5.

Q. About 5 men?

A. Yes.

Q. And how many men would you have pouring concrete?

A. 4, and a finisher would be 5.

A. Yes.

Q. 4 and a finisher, or a total of 5 men?

A. Yes.

(Testimony of Lawrence E. Bufton.)

Q. And in connection with setting the forms, you would expect to do a certain amount of shovel work, hand shovel work, would you not, sir?

A. That's a question that I'm not going to answer here, because there is a conflict of what two contractors should do. Now, that's a matter of whether I agreed to do some excavation, I would expect to do some excavation; if I had not agreed to do it, I would not do it.

Q. Pretty clearly there is a difference between excavation and doing a little trimming with a shovel in order to get your form set, isn't there?

Mr. Olson: I think that's a matter——

The Court: I'll overrule the objection.

A. That is a matter of quantity, I'd say.

Q. And also the type of equipment used, too, isn't it, sir?

A. You mean equipment for what?

Q. An excavation job normally contemplates power equipment, does it not?

A. This job here couldn't be accomplished with power equipment.

Q. It had to be completed by hand, didn't it?

A. It had to be completed by hand, yes. [1332]

Q. Now, this soil is sandy to a considerable degree, is it not?

A. Yes, sandy loam.

Q. And after an excavation is complete a certain amount of sand will drift down into the excavation, will it not?

A. If your slopes are right, there might be a little blow in, or something of that sort.

(Testimony of Lawrence E. Bufton.)

Q. And the flatter the slope the more blow in?

A. Well, might be a little blow in.

Q. And in dropping your forms down in the excavation a workman might cave in the lip?

A. If you have your excavations on a 1 to 1 slope there would be very little danger of that.

Q. Even on a 1 to 1 slope a workman might kick down where the form is to rest?

Mr. Olson: I object to asking the witness to speculate as to what might possibly happen.

The Court: Overruled.

A. Oh, I suppose a workman might, surely.

Q. And if he did, he would have to do some shovel work, wouldn't he?

A. Yes, he would have to shovel it out.

Q. Then it would be expected, would it not, that the men setting the forms would have shovels there, hand shovels?

A. Well, I would certainly have a shovel on the job, yes. [1333]

Q. And then you would expect the form setters to do a certain amount of shovel work, wouldn't you?

Mr. Olson: I think that's argumentative.

Mr. Hawkins: I'm asking for his opinion. I don't think I'm arguing at all.

The Court: I'll overrule it.

A. If I had a contract with somebody who had agreed to——

Mr. Hawkins: Just a moment, sir. Your Honor, this is not answering the question I asked.

(Testimony of Lawrence E. Bufton.)

The Court: I think he has answered it that he would expect to do some shovelling if the dirt fell in.

Q. Yes; now then, I believe you estimated that the troubles which Mr. Schaefer had on this job, or which he contends he had on this job, as enumerated by counsel in his hypothetical question, would result in 1062 costing from two to three times as much as it should cost?

A. Yes, that would be very possible on this job.

Q. Did you take into consideration the fact that Mr. Schaefer actually had on the job not to exceed 12 men at a time?

A. That's something that I can't answer at all.

Q. Now, just a moment; I submit, Mr. Witness, that you can answer it. Would you read it?

Mr. Olson: I'm going to object on the ground it is assuming a state of facts not in the evidence, 12 men on the job. I don't know of any testimony to that [1334] effect, that Mr. Schaefer never had more than 12 men on the job.

Mr. Hawkins: I think it is giving the evidence the benefit of the doubt. I think the testimony is there were two on excavation, and two or three on panel work, and another man using a gunny sack, or sacking, or whatever it is called. The payroll is in evidence, is it not? Plaintiff's 52, your Honor, shows that.

The Court: Well, I'll overrule the objection.

Witness: May I ask that the question be read again, please?

(Testimony of Lawrence E. Bufton.)

(Whereupon, the reporter read the last previous question, as follows: "Did you take into consideration the fact that Mr. Schaefer actually had on the job not to exceed 12 men at a time?")

Q. Did you take that into consideration in giving your opinion? A. I don't see—pardon me.

Q. Did you take it into consideration?

A. I said to do the job in four months—wait a minute, I'm off the beam. I beg your pardon. You're talking now about when I said it might cost two or three times as much?

Q. Was that your testimony, that it might cost two or three times? [1335]

A. I got myself mixed up. You're talking about my having made the remark that it might cost two to three times as much, and then taking into consideration that Mr. Schaefer had only 12 men on the job; I can easily take that into consideration this way——

Q. I'm not asking you to take it into consideration at this time.

The Court: Just a moment. I may be mistaken about this, but it is my recollection of the testimony that he didn't testify that Mr. Schaefer's expenses were two or three times as much as it would have cost under ideal conditions. He testified that taking into consideration the various elements counsel mentioned here, that under the hypothetical state of facts, it would cost two or three times as much. Did he ever testify as to what Mr. Schaefer's costs were?

(Testimony of Lawrence E. Bufton.)

Mr. Olson: No. I don't think he's in a position to.

Q. Very well, I will strike my question, then. Mr. Bufton, in giving your opinion to a sub-contractor——

Mr. Holman: May it please the Court, for the purpose of the record, in view of the fact that counsel has stricken his question, I noted that he called this book Exhibit 52. Now, I understand that is only an identification, and has not been admitted. In other words, I am [1336] concerned with having the record identify that as an exhibit.

The Clerk: It is identification 52.

Mr. Hawkins: I stand corrected.

The Court: The record will show, then, that it is an identification, and not an exhibit.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Bufton, in giving your opinion that the cost would be two or three times as much if a sub-contractor had the difficulties that counsel enumerated in his hypothetical question to you, did you take into consideration the number of men on the job?

A. I didn't know how many men were on the job.

Q. You didn't know how many men were on the job?

A. No.

(Testimony of Lawrence E. Bufton.)

Q. How many men would you expect to be on the job under those circumstances?

A. I said if it was done in four months it would take an average of 25 men per day.

Q. An average? A. Yes.

Q. In some cases it would be more than 25 men?

A. Yes, it might vary.

Q. At the start there would be considerably more than 25?

A. There should be, theoretically, but it might be difficult [1337] to do that.

Q. No, I'm not concerned about that right now. You would have more than 25 at the start of the job, is that right, sir?

A. Well, the very start of the job you would have less, then you build yourself up to perhaps more than 25, then as your crew got trained you probably might have less than 25 afterwards.

Q. And what would be the maximum number of men you would have on the job in order to accomplish this? A. Probably 30 or 32.

Q. 30 or 32? A. Yes.

Q. And if in fact there were never more than 12 men on the job, you would not expect to get the job accomplished in four months, would you?

A. I couldn't.

Q. In estimating the profit on 1068, you assumed a competent and efficient sub-contractor?

A. Right.

Q. If in fact that sub-contractor had shown a material loss on a similar contract the year preced-

(Testimony of Lawrence E. Bufton.)

ing, through improper operations on his part, you would not expect that sub-contractor to make a profit on 1068, would you?

Mr. Olson: Just a minute. If I understand that [1338] question right, your Honor, that is certainly assuming something that is not in the evidence. I wonder if I could have it read?

The Court: Yes, all right.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: Now, if your Honor please, I object to that as assuming a set of facts not in the evidence or referred to in the evidence. It is argumentative in its form, and asking for a conclusion that does not relate to any issue involved in this case.

The Court: I'll sustain the objection.

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. I believe you testified that it was always disastrous to carry on a contract over the winter?

A. Always expensive, too.

Q. Well, I think you said always disastrous.

A. Pardon me, I didn't quite get you. You had your hand up over your face.

Q. Always disastrous, is that your testimony?

A. Depends on the type of work, of course. It costs more in the wintertime than it does in the summer. There might be a class of work under cover where it wouldn't cost a bit more.

(Testimony of Lawrence E. Bufton.)

Q. Wasn't your testimony it was "always disastrous"? [1339]

A. I was thinking about the particular type of work, outside work it is disastrous.

Q. You had in mind outside work?

A. Yes.

Q. Now, with reference to this Deschutes job, that was outside work? A. That's right.

Q. And it was carried on over the winter?

A. In December and January they had protected their concrete, heated their water, and it cost more money. They had 3500 yards of concrete to place between the 1st of November, you might say, and the 30th of April.

Q. And you ascertained that they were making a profit on that contract, did you not, sir?

A. Yes.

Q. Then it is not always disastrous to carry on a contract over the winter, outside?

A. Well, it costs more money; perhaps state it that way.

Q. In other words, when you said it was always disastrous, to carry on a contract over the winter, all that you meant was that it would probably cost more money?

A. Yes, it is disastrous if it does cost more money.

Q. Beg your pardon?

A. It is disastrous if it does cost more money, to a contractor. [1340]

(Testimony of Lawrence E. Bufton.)

Q. That again would depend on what he was being paid for his work, is that right?

A. I didn't get that question.

Q. Again it would depend on what he is being paid for his work?

A. He may contract for something that he has to do in the wintertime, and set his price to take care of it.

Q. Now, you've examined exhibits 23 and 25, have you, sir? A. 25?

Q. Those are those two models over there, model excavations. A. I've seen them.

Q. In all of your experience have you ever seen an excavation like Exhibit 23?

A. I'll have to be sure of what you're talking about.

Q. This one is Exhibit 23.

A. I never saw one so nicely done as that in my life.

Q. And in all of your experience have you ever seen an excavation like Exhibit 25?

A. Yes, I can visualize how that could have been done.

Q. Just a moment——

A. I mean, I've seen that sort of thing done, yes.

Q. You've seen excavations such as that?

A. Oh, yes.

Q. Now, with reference to Exhibit 23, would it be possible to pour the structure that's set in there, marked Exhibit [1341] 24, in one pour?

A. Surely.

(Testimony of Lawrence E. Bufton.)

Q. What about this bank, Exhibit 23a, would that cave in when the concrete was poured on top of it? A. Where?

Q. Bank 23a.

A. You protect yourself against that. I said I never saw an excavation as beautifully done as that. That's what you're asking me.

Q. No, I didn't. I'm asking whether you expect 23a to cave in when you pour this form?

A. If I did, I'd put a board down there.

Q. Now, just a moment, would you expect that to cave in?

A. I might even allow it to cave in a half a foot or something.

Q. You're an engineer, you've had vast experience in pouring concrete. I'm asking you just this simple question, would you expect 23a to cave in?

A. No, I wouldn't. Absolutely not.

Q. In your opinion is it proper to pour concrete upon a vertical bank as a foundation?

A. Why, sure.

Q. That's perfectly proper?

A. I've done it on the inside of the hole too.

Q. Whereabouts, sir. [1342]

A. I'll have to take this out to show you. This bank here had to be graded perpendicularly, up and down, and a form came here; there was no form on this side at all; there was no form here.

Q. That's perfectly true; you had this entire bank to support that concrete wall, did you not, sir?

A. Why, sure.

(Testimony of Lawrence E. Bufton.)

Q. What would be supporting 23a?

A. That little spot down there?

Q. Yes. A. This dirt right here.

Q. And what would keep 23a from collapsing and caving?

A. You throw a shovel full of dirt up against that.

Q. You would fill that in with dirt?

A. When the first concrete came down there I'd take a shovel and throw dirt up against it.

Q. In other words, the proper way would be to crib that slope?

A. This is a theoretical slope, mind you. There is nothing that requires you to do that perfectly. The reason, when you get a place down in the bottom where you have to throw it up by hand——

Q. You expect to throw dirt in there?

A. I would flatten that slope flatter than that.

Q. You would expect to throw dirt up from the bottom when [1343] setting these forms?

A. I would expect I ought to, because I couldn't dig it with the equipment I had.

Q. You would expect to do some shovel work when you set the forms?

A. Somebody had to; I'm not saying who.

(Whereupon, a portion of Exhibit 3 was marked 23b.)

Q. Now, with reference to 23b, that's just what I might call a clean cut in the dirt. You do not have a wood form up against 23b, do you?

A. Not at that point there, no.

(Testimony of Lawrence E. Bufton.)

Q. The concrete is poured directly against 23b?

A. Let me understand exactly what you mean; at this spot here 23b, the concrete is poured directly against this wall in the earth.

Q. And in pouring the concrete might not dirt be knocked down in there?

A. You have an inspector right there watching pretty close to see that it didn't.

Q. It might happen?

A. Could happen, yes. He might make you take it out.

Q. If the dirt did fall down there, he would require you to stop pouring, would he not?

Mr. Olson: That certainly asking for speculation [1344] of this witness.

A. I can explain this.

The Court: All right; overrule the objection.

A. This inside form which would be the one in here, see, would be hung so at the depth of that floor, perhaps 8 inches, there would be 8 inches open, and you would get in there before you start pouring concrete at all, and you start pouring one of them right down that wall, if you know what you're doing.

Q. All right; now, if you knock dirt down into the space between the form and the bank marked 23b, good practice would require you to remove that dirt before you made any further pour?

A. You just wouldn't do it in that case. Your bank would be all right when you started to pour; you would pile up; you wouldn't start pouring down there.

(Testimony of Lawrence E. Bufton.)

Q. If you do knock dirt in there you have to stop the pour and remove that dirt?

A. If the engineer makes you stop it.

Q. Now, in pouring concrete against that dirt wall, the type of dirt that you saw out there when you were visiting it the other day, is not there a good chance that that dirt would fall down?

A. In very dry weather some of that dirt would fall down and you have to clean out a little of it there on the [1345] bottom right where you're pouring; you would have that twelve inches down there to clean out.

Q. Excepting for very dry weather——

A. In damp weather that stands up very nice.

Q. You can make a vertical bank that will stand up under concrete pour out there on 1062?

A. That is my belief, anyway.

Q. While we're here, with respect to vertical excavation, if an excavation is 18 inches to 2 feet from the neat line of the concrete wall, vertical, is that not adequate in order to place your forms and remove them?

A. I'd never do it that way myself.

Q. I'm not asking what you would do. I'm asking if that would not be sufficient in order to place your forms and remove them.

A. Well, let's figure it out; you've got about 9 inches of timber, 8½ perhaps, and I'm talking about your sheeting, your studs, your strong-backs, then you've got your rod that sticks out there another three or four inches, perhaps. A

(Testimony of Lawrence E. Bufton.)

man would have to have 18 inches plus room enough to work. If it is a vertical bank I would say he'd have to have 3 feet.

Q. He'd have to have 3 feet from the vertical bank, in your opinion? A. Yes. [1346]

Q. Regardless of the depth of the excavation?

A. Why, yes, sure; what difference would that make?

Q. I'm asking you.

A. That's right, pardon me.

Q. If the structure is only 4 feet deep, you believe that the vertical excavation would have to be 3 feet?

A. I would say not quite, but he still has got to have room to stand; yes, he's darn near got to have the same room.

Q. He'd have to have three feet clearance from the neat line of the concrete wall?

A. Yes, to work efficiently.

Q. Of course, 1 to 1 slope you don't have a 3 foot clearance?

A. No, but you've got that slope to work on.

Q. If you're working on that she-bolt on the bottom you're crowded, aren't you?

A. On a 1 to 1 slope?

Q. Yes.

A. Yes, but I say that she-bolt doesn't go down to about a foot or more from the bottom. If you've got a foot here, you've got two feet or better.

Q. Just two feet?

(Testimony of Lawrence E. Bufton.)

A. Well, if it was just a foot from the bottom of the concrete, you'd have two feet horizontal, it would be.

Q. That is, two feet from the neat line; not two feet from [1347] the strongback.

A. No, I said it would be equal to having two feet of horizontal clearance from the neat line of the concrete.

Q. As a matter of fact, you would have only about a foot from the strongback, and less than that from the she-bolt? A. That's right.

Q. It is your opinion that with a vertical excavation you have to have a three-foot clearance from the neat line of the concrete?

A. To work efficiently.

Q. Do you know whether it would be possible to use a bulldozer on a job such as 1062?

A. Pardon me, I didn't hear that.

Q. Do you know whether it would be possible to use a bulldozer on a job such as 1062?

A. Yes, it would.

Q. In your direct examination I believe you testified it was impossible to cut a vertical bank with a bulldozer, is that right, sir?

A. That's right.

Q. Do not the specifications in this case call for vertical banks in some instances?

A. It does; as I say, you have to do part of this job by hand. You don't dig any vertical banks with a bulldozer.

Mr. Hawkins: You may take the witness. [1348]

(Testimony of Lawrence E. Bufton.)

Redirect Examination

By Mr. Olson:

Q. Mr. Bufton, have you been here throughout this trial?

A. Well, quite a bit of the time; too much.

Q. Beg your pardon?

A. Yes, I've been here quite a bit of the time.

Q. Were you here the beginning of the trial, the first day?

A. I was here the morning it opened.

Q. And have you been here every day since, that the trial has been in session?

A. No, I haven't been here every day that the trial was in session.

Q. I don't mean right in the courtroom, but I mean in Yakima.

A. I went home last Friday. I wasn't here in the court last Friday, and I don't think I was last Thursday afternoon.

Q. Mr. Bufton, handing you plaintiff's Exhibit 3 and Plaintiff's Exhibit 12, I am referring to counsel's question asking you whether or not in the examination of the structural layout plans and the specifications whether or not you inspected and examined the original exhibits in court, or whether you had examined others; I will now hand you a book entitled "Specifications No. 1062, earth work, pipe lines, and structures, laterals 59.3 to 69.8 and sub-laterals" and ask you to examine that and tell [1349] me whether or not the specifications which you examined are the same as plaintiff's Exhibit 3?

(Testimony of Lawrence E. Bufton.)

A. By the title page they must be the same.

Mr. Holman: Mr. Olson, if you say so, I don't make any point on that, and I didn't with the witness; I had no intention to with the witness.

Mr. Olson: That's all I want to show. The record shows that the witness didn't examine the same.

The Court: If there is no question about it, let's don't take any time on it.

Mr. Holman: The only thing, your Honor, I had in question, Mr. Olson's accountant and the accountant I had here were going to put the correct units in exhibits 2 and 3, but it has not been done, and the only thing I was concerned is whether or not he was considering these figures in here, which are erroneous, and he said he did not, so I was not concerned with it.

Mr. Olson: Your Honor, that point had just as well be taken care of. I'm a little confused with reference to what obligation is on who. I have now put into evidence the final pay estimates, which include in them, as testified by Mr. Keller, the bid price. Now, is there—do you want more than that?

Mr. Holman: Well, in order to have them identical I would respectfully ask that the Clerk be permitted to [1350] put the bid prices in from the exhibits, 61 and 62, is it?

Mr. Olson: I think that's it. What I have in mind, there is a place here for the contractor to calculate his bid. I think as far as 1062 is concerned they're in there right.

The Court: 1068 is the one that are not in there?

(Testimony of Lawrence E. Bufton.)

Mr. Olson: I think they're wrong, and they should be deleted, the ink figures on the schedule there should be deleted.

The Court: I see.

Mr. Holman: Mr. Olson, I have checked Exhibit 3, that's 1062, and it is complete.

The Court: Why not have the clerk, then, delete these in the other exhibit.

Mr. Holman: Strike out those that are in at present, your Honor, because that was evidently used to figure some other job; has nothing to do with this job at all.

Mr. Olson: That's what I understand. That's all the questions I have.

The Clerk: On that same matter, before we leave this, do you mean by striking out, with a red pencil lining through the figures, would that be sufficient?

Mr. Holman: I think so, or I would like to have inserted in here the figures from the other exhibit.

The Court: Do you care to undertake that?

The Clerk: That's O.K.

The Court: Both counsel then agree that Mr. LaFramboise shall insert the correct figures in this exhibit?

Mr. Olson: Yes.

The Court: If he has any doubt about it, you had better direct him, both of you, so there won't be any question about the figures.

Mr. Olson: I take it the figures will be taken from the Bureau of Reclamation's final estimate, Exhibit 62.

(Testimony of Lawrence E. Bufton.)

The Court: What is the one from which you're striking, then?

Mr. Holman: Plaintiff's Exhibit 4.

The Court: All right, Mr. Holman.

Recross-Examination

By Mr. Holman:

Q. I forgot to ask you, Mr. Bufton, I believe you said that a transit mixer was an impractical method of pouring concrete for forms on reclamation jobs?

A. No, I didn't say that, Mr. Holman.

Q. Pardon me, you didn't. I believe your statement was in substance the Mixomobile was better?

A. Yes.

Q. That's right; thank you; and your reason was that the transit type of mixer, which revolves the aggregates as [1352] it travels——

A. In transit.

Q. ——has to discharge its whole batch at one pouring, is that correct?

A. No; perhaps you misunderstood me.

Q. You mis-spoke yourself, then, sir. I just couldn't follow you.

A. It has to be all discharged before you take it back to the batching plant again. You might pour out half of the batch here and then take it over and pour out the other batch there, but you wouldn't take it back to the plant before you discharged the whole batch.

Q. But the rotary drum holding the aggregates

(Testimony of Lawrence E. Bufton.)

and mixing them as the unit travels from the batching plant to the form—— A. Yes.

Q. ——will be mixing that aggregate?

A. Yes.

Q. And saving time there, will it not?

A. Yes.

Q. And then when it gets to the form for pouring, if that form requires less than the full amount of that batch, it can take the rest of that back, mix in more aggregate, and go on to another form, could it not? A. That's right.

Q. Now, if you have two transit mixers instead of one Mixomobile, [1353] those can be passing and accelerate the pour, can they not?

A. You miss my point, though.

Q. Never mind your point, sir. Can't that be?

A. They can be passing.

Q. You could double your efficiency with two transit mixers? A. Yes.

Q. As against one Mixomobile? A. No.

Q. Why not?

A. Because one Mixomobile is on the job all the time. You're feeding that with the number of trucks that you want.

Q. It has to go back for those aggregates, does it not?

A. Yes, but when that batch truck gets there, he has enough materials to make three cubic yards of concrete.

Q. That has to be auxiliariated, then, with another truck? A. Sure.

(Testimony of Lawrence E. Bufton.)

Q. With your transit mixer, it itself gets the aggregates and mixes them on the way?

A. Yes.

Q. So that time is saved?

A. There is time saved, but you're hauling half as much material.

Q. Is that good or poor economy on this kind of job?

A. Either one can be used. I said the mixer was the more [1354] economical.

Q. Is it good or poor economy to use a transit mixer on this job?

A. If you say poor economy, I say it's poorer economy than the Mixomobile, but not only that, the Buggymobile——

Q. How far apart did you understand that these holes were?

A. Well, if you want to average it back, that's the best I could do, I presume the structures are probably a thousand feet apart; maybe not that much, maybe more than that.

Q. And the advantage of agitating the aggregates and the cement with the water en route would not expedite the job as against bringing it there and then taking the time to mix it on the job?

A. No.

Q. Why not?

A. Because you've got one man and a piece of equipment that cost twice as much, or more, perhaps, in the transit mixer than you have in a truck that's hauling twice as much concrete material. If you're going to haul that equipment all

(Testimony of Lawrence E. Bufton.)

the time, back and forth, you're hauling a mixer to your job and back to your plant every time you take a batch out there, aren't you?

Q. Mr. Bufton, isn't it a fact even from your own experience that the Mixomobile type is used for something where there is line production?

A. They use it everywhere.

Q. And that the transit mixer is the unit type usually used where there is sporadic pouring?

A. I have used both.

Q. Isn't that a fact?

A. In my opinion, that's all I can tell you, if I were going to do this job, and I owned transit mixers myself, and I owned Mixomobiles and Buggymobiles, I would use the Mixomobile and Buggymobile, because I would know that I could do it more economically than I could with the transit mixers. Now, that's the best answer I can give you.

Mr. Holman: That's all.

The Court: Mr. Hawkins?

Mr. Hawkins: I have no further questions.

(Whereupon, there being no further questions, the witness was excused.)

(Whereupon, the Court took a recess in this cause until Monday, March 10, 1947, at 1:30 o'clock p.m.) [1356]

Yakima, Washington, March 10, 1947

(All parties present as before, and the trial was resumed.)

L. R. HENDERSHOTT

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please.

A. L. R. Hendershott.

Q. And how do you spell your last name?

A. H-e-n-d-e-r-s-h-o-t-t.

Q. Where do you live, Mr. Hendershott?

A. Aloha, Oregon.

Q. Is that close to Portland, someplace?

A. About 15 miles west of Portland.

Q. What is your occupation, Mr. Hendershott?

A. A certified public accountant.

Mr. Holman: Your Honor, I move that the answer be stricken as not based upon the best evidence.

The Court: It will be denied.

Q. How long, Mr. Hendershott, have you been engaged in the accounting business?

A. I have been practicing as a principal for two years, and about 11 years altogether.

Q. How long altogether? [1357]

A. 11 years.

(Testimony of L. R. Hendershott.)

Q. And how long have you been a Certified Public Accountant?

Mr. Holman: Again I object, your Honor, as not the best evidence.

The Court: Overruled.

A. Since I believe it was April, 1944.

Q. Are you now practicing your profession and maintaining an office for that purpose?

A. I am.

Q. Mr. Hendershott, as a certified public accountant did you examine the books and records of the Concrete Construction Company relative to expenditures made by it in connection with specifications 1062 of the Roza Project? A. I did.

Q. And did Mr. Schaefer or the Concrete Construction Company make its books and records available for your inspection? A. They did.

Mr. Hawkins: Your Honor, I move that that answer be stricken. It is obviously based on hearsay.

The Court: He's just stating what he had as the basis of his examination, isn't he?

Mr. Hawkins: I understand that the witness testified that all of the books of the Schaefer company relating to 1062 had been delivered or made available to him, and I don't see how this witness can testify as to that. [1358]

The Court: I didn't assume that he testified it was all the books of the company. He said that certain books were given to him, and he made his examination on that.

(Testimony of L. R. Hendershott.)

Mr. Olson: I said the Concrete Construction Company made available its books and records.

The Court: I'll overrule the objection.

Direct Examination

(Continued)

By Mr. Olson:

Q. Would you state, Mr. Hendershott, what records you did examine in connection with 1062?

A. Well, there was the retained copies of the certified payrolls, and their general payroll records, original vendor's invoices as pertaining to materials and job sundries, the general books of original entry, and the general ledger of the company.

Q. When did you make this audit, or complete it, Mr. Hendershott?

A. My letter to Mr. Schaefer was dated November 26, 1945, and that was within a few days after I had completed the work.

Q. Did you make up a written audit and report to Mr. Schaefer covering your audit?

A. I did.

Q. Do you have a copy of that with you?

A. Yes, I have. [1359-1360]

(Whereupon, carbon copy of statement of costs was marked Plaintiff's Exhibit No. 63 for identification.)

Q. Mr. Hendershott, showing you plaintiff's identification 63, I'll ask you to state what that is.

A. That's a carbon copy of the costs as shown

(Testimony of L. R. Hendershott.)

by records of the Concrete Construction Company on the Roza Project, job number 1062, and my letter of transmittal.

Q. Did you also, Mr. Hendershott, at my request, have some copies of your audit, exclusive of your letter, printed up? A. I did.

Q. Do you have those with you?

A. Yes, I have.

Q. And are those printed documents true and correct copies of the one that you typed up, being plaintiff's identification 63, exclusive of the letter?

A. Yes, they are.

Mr. Olson: Your Honor, I thought that as a matter of convenience, I see some of them don't have these.

The Court: You may pass the copies around, then, if you wish, to the court and other counsel.

Mr. Olson: It is all on one sheet; it is a little easier to follow.

Q. Now, Mr. Hendershott, what is the first item that you [1361] show on your audit?

Mr. Hawkins: Your Honor, this hasn't been offered in evidence yet, or admitted in evidence. I don't think it is proper to interrogate to the items until it is admitted.

The Court: Yes, it doesn't seem to me that the contents should be gone over until it is offered in evidence. Was your purpose to have him show what this is now in order to lay the foundation for its admission, or do you wish him to testify as to its contents?

(Testimony of L. R. Hendershott.)

Mr. Olson: I was going to go through it. When I offered it previously I think counsel's objection was I hadn't gone over the contents first. It makes no difference to me. I'll offer the identification in evidence now.

Mr. Holman: Your Honor, I wish to render this objection to the acceptance of the exhibit as evidence: In the first place, for the reason already indicated, that L. R. Hendershott, the witness on the stand, has not produced any of his credentials or authority to serve as a Certified Public Accountant. The testimony of the witness fails to show where he claims to be a Certified Public Accountant, and under what authority he claims to be a Certified Public Accountant. The letter of transmittal and this compilation, at least I assume it is the [1362] same thing, was made as Exhibit A to the amended answer and cross-complaint of the plaintiffs in this litigation, in this suit, and with reference to the transmittal letter to Mr. M. C. Schaefer and signed by this witness, there is no representation therein and there is no certification therein of the correctness of this as an audit whatsoever. This witness has not given this compilation the authoritative certification which a Certified Public Accountant must do, and therefore it becomes no more than a summation of an individual's ideas of what the books and records of someone else as carried on, and it is therefore based on hearsay, and it is wholly irrelevant, incompetent and immaterial; my point specifically being, your

(Testimony of L. R. Hendershott.)

Honor, that this is not, nor does it purport to be, a Certified Public Accountant's audit.

The Court: Well, it is offered, isn't it, as an audit of an expert in accounting. Is there any particular magic about the Certified Public Accountant's audit and his certification, that makes it admissible in evidence? I'm just asking you.

Mr. Holman: I have this in mind, your Honor; at least in the State of Washington, and I presume this gentleman is in the State of Oregon, although it hasn't been said, at least in the State of Washington a Certified Public Accountant is licensed, and the best evidence is [1363] the production of his license.

The Court: That would be true of an engineer, too, wouldn't it? We don't ordinarily make an engineer bring in his diplomas and his licenses to practice. A man is usually permitted to get up and tell what his expert field is, without producing documents.

Mr. Holman: That is correct, and yet this purports to be a certified compilation by this accountant, and my point is, it is not so certified.

Mr. Hawkins: I would like to point out that nominally an audit entails a sending out of letters to the creditors, and an actual check of the inventory on hand by the Certified Public Accountant or someone under his direction. It entails an actual personal check of the various creditors of the subject corporations or the subject being audited. This is not an audit in the true sense of the word "audit" at all. It is merely a summation

(Testimony of L. R. Hendershott.)

by an expert in the accounting field of what the books of the Concrete Construction Company show.

The Court: Is it your contention that this is not admissible?

Mr. Hawkins: It is my contention that a proper foundation has not been laid for the admission of this in evidence.

The Court: In what way? [1364]

Mr. Hawkins: In that the books and records of the Concrete Construction Company are not in evidence; the parties who prepared those books have not presented themselves for cross-examination, to show where they got the figures, how and so on; all we have here is a summation by this gentleman, admittedly an expert, let's say that he is a Certified Public Accountant, for the purpose of argument, of what the books of the Concrete Construction Company show. We have nothing here concerning those books; we have nothing to show how those books were prepared, or by whom or in what manner the figures were obtained, and I submit, therefore, that the proper foundation has not been laid for the admission of plaintiff's identification 63.

The Court: Perhaps you had better go into the qualifications of the witness a little more thoroughly. There might be some question about that part of it. It seems to be questioned here.

Mr. Olson: Do you mean as to whether or not he is a Certified Public Accountant?

The Court: Yes, and his experience as an accountant, although he stated that in a general way.

(Testimony of L. R. Hendershott.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Well, Mr. Hendershott, how actively have you been engaged in accounting and as an accountant during the past 11 [1365] years, as I understand you have been working at it?

A. For the time up until I took the examination and received my own certificate I worked in the office under the guidance of another Certified Public Accountant.

Q. What kind of work were you doing, Mr. Hendershott?

A. Well, 'most anything in the accounting field is gone into in an office over a period of years; auditing of various kinds, installation and maintenance of bookkeeping systems, income tax work.

The Court: Where is he a certified public accountant?

Q. Where are you a Certified Public Accountant?

A. Licensed in Oregon under the jurisdiction of the American Institute of Accountants.

Q. And when you become a Certified Public Accountant, is that under State, or is that national?

A. The examination is prepared by the American Institute and submitted, I believe, to 46 of the 48 states. An examination is taken in each of those states on the same day, and all papers are

(Testimony of L. R. Hendershott.)

sent to New York to the main office of the American Institute for correction and for grading.

Q. Is it true, then, that to become a Certified Public Accountant in Oregon or Washington that the same examination is taken?

A. Exactly the same. [1366]

Mr. Holman: Just a moment; I submit the witness is not shown qualified to answer as to the laws of other states; at least he's asking about Oregon and Washington both.

The Court: Well, he should know what is necessary to become a Certified Public Accountant, and I'll overrule the objection.

Mr. Holman: Also I would like an objection on not the best evidence; the law is the best evidence, your Honor.

The Court: Overruled.

A. (Witness) Oregon and Washington give the same examination, and if you hold a certificate in one state and change your residence to the other, they will reciprocate.

Mr. Holman: I move that answer be stricken for the same reason, your Honor.

The Court: Denied.

Direct Examination
(Continued)

By Mr. Olson:

Q. And now, since you've had your own office, Mr. Hendershott, how long is it you've maintained your own office?

A. Two years, or a little over two years.

(Testimony of L. R. Hendershott.)

Q. And during that time what has been the nature of your work?

A. Well, largely installing and supervising the keeping of records in various offices. [1367]

The Court: What do you get when you become a Certified Public Accountant, a certificate?

A. A Certificate.

The Court: Do you have a certificate?

A. Here's my license.

Mr. Olson: Would you mark this for identification?

(Whereupon, Hendershott's C.P.A. license was marked Plaintiff's Exhibit No. 64 for identification.)

Mr. Olson: We'll submit a copy of it. I understand that he'll want that with him, no doubt. I wasn't going to deprive you of it permanently, Mr. Hendershott.

The Court: Who issues the license?

A. The State Board of Accountancy.

The Court: I suppose we could take a deposition down there of the State Board, or some member of it.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Hendershott, showing you plaintiff's identification 64, I'll ask you what that is?

A. Well, this is the receipt that we receive annually at the time we pay our dues to the State

(Testimony of L. R. Hendershott.)

Board of Accountancy, and is an annual license certificate.

Q. And what period does it cover?

A. From July 1, 1946, to June 30, 1947.

Mr. Olson: We offer plaintiff's identification 64 [1368] in evidence, with the request that we be authorized to substitute a copy of the same.

Mr. Hawkins: We have no objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 64 for identification was admitted in evidence.)

Q. Are you authorized to appear before the Treasury Department, to practice as an agent before the Treasury Department of the United States, Mr. Hendershott? A. Yes, I am.

Q. Now, Mr. Hendershott, did you answer what work you had been doing, the nature of the work, during the two years that you've been operating your own office?

A. I have installed several bookkeeping systems, cost accounting systems, and supervised the office procedure in a number of different firms.

Q. Now, is plaintiff's identification 63, Mr. Hendershott, a true and correct audit of the books, records and invoices of the Concrete Construction Company with reference to expenditures made as shown by those books, records and invoices in regard to specifications 1062 of the Roza Project?

A. Mr. Olson, before I answer that, I think that there should be a little clarification of the term "audit", if I may. [1369]

(Testimony of L. R. Hendershott.)

Mr. Hawkins: I would like to have the witness explain that term. I think it has a special meaning in accountancy.

The Court: Well, I think what we want the witness to do is explain what this identification is, and what it represents, and if he has to define "audit" to do that, I think it is all right for him to do it.

Witness: In the accounting practice there are several different types of audits. There is the complete audit, which is the type Mr. Hawkins made reference to in his objection a while ago, where you get confirmations from creditors and customers as to accounts owing or owed to the firm. There's a balance sheet audit, in which you go into the various items on the balance sheet of a corporation or any business, and determine whether or not the items stated on the balance sheet are equitably stated, and are worth the amount of money as shown by the balance sheet; or there is a special purpose examination, in which you may take only a portion of the records of a company to determine some specific result, as pertains to one particular portion of their operation, and that is not customarily referred to as an audit, because insofar as that portion of their operation is concerned, there may be no relationship, other than in a general way, between that and the general records of the company. I [1370] think that if Mr. Olson will refer to this as an examination, it will be a little more accurately stated.

Q. Well, we'll avoid all that, Mr. Hendershott, by asking you to state what that plaintiff's identification 63 is. You made it, now state what it is.

(Testimony of L. R. Hendershott.)

A. It is a recapitulation of the original documents as pertaining to this one particular job, with the exception of the overhead item, which is of course based upon general operations.

Q. And those original records that you spoke of, were they in your possession during this examination?

A. They were in my possession then, and are still in my possession.

Mr. Hawkins: Again I renew my objection and move it be stricken, because hearsay is inherently involved in it. This man is testifying that original records are in his possession. He would have no way of knowing they were original except by statement of one of the Schaefers.

The Court: I'll overrule the objection. He says they are the records from which he made this examination. Where are they, here?

A. They are.

The Court: They are available to the other side if they care to go into them? A. They are.

The Court: And this is a summation of those documents you have? A. That's right.

Mr. Olson: I understand he has them in his briefcase.

The Court: All right; I just wanted to know that they are available.

Mr. Olson: We renew our offer.

The Court: Same objection?

Mr. Holman: Yes.

(Testimony of L. R. Hendershott.)

Mr. Hawkins: We make the same objection.

The Court: Overruled; it will be admitted.

(Whereupon, Plaintiff's Exhibit No. 63 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Will it be more convenient to you, Mr. Hendershott, to follow on this exhibit itself, or on the printed one?

A. I think the printed form.

Q. Now, taking the first item shown on plaintiff's Exhibit 63 of Labor, would you explain what that is, what it represents, and how it was arrived at?

A. That is the total of the labor shown on the retained copies of the certified payrolls submitted on job 1062.

Q. Now, you have various columns here; would you explain what each column indicates, Mr. Hendershott? [1372]

A. Those are the months in which labor was expended, or in which all these expenditures have occurred during the course of the work.

Q. The 1944 and 1945 indicate what?

A. And that's the years in which the various months fall.

Q. And the column on the extreme right of the Exhibit 63 indicates what?

(Testimony of L. R. Hendershott.)

A. That is the total for the job. That is a cross total of all the columns.

Q. So, then, the total labor is what figure?

A. \$53,280.87.

Q. Now, that figure was obtained from where, Mr. Hendershott?

A. From the retained copies of the certified payrolls.

Q. Now, your next item is what, and how was it arrived at?

A. That's the payroll insurance to the State of Washington, Department of Labor and Industries, I believe, based on .024 cents per man hour worked.

Q. And how did you arrive at the figures shown thereon?

A. That is a computed figure taken from the totals shown on the certified copies of the payrolls of the man hours.

Q. And that makes a total of how much on this job?

A. \$831.64.

Q. Now, your next item is what?

A. That's payroll taxes, 4 per cent.

Q. Explain that. [1373]

A. Which is made up of State of Washington unemployment, 2.7 per cent, Social Security, Federal old age benefit, 1 per cent, Federal Excise Tax of 3/10 of 1 per cent, based upon the amount of labor shown in each of the various months, and a total for the job of \$2131.21.

Q. All right, now your next item is what?

A. Truck hire.

(Testimony of L. R. Hendershott.)

Q. And explain that item, and give the amount.

A. That was the amount paid for rental of a truck on the job site, in the amount of \$2919.96.

Q. Now, on your examination and on this exhibit that you have prepared, Mr. Hendershott, is that and each of the other items broken down into months? Are they broken down into months, the amount expended each month?

A. Yes, they are.

Q. Now, what is your next item?

A. Next item is equipment rental in the amount of \$14.00.

Q. Do you happen to recall what that item was?

A. I believe that was to Benton County for rental of a bulldozer.

Q. Rental of a what?

A. Of a bulldozer, I believe.

Q. All right; now, what's your next item?

A. Small tools.

Q. And what does that consist of? [1374]

A. That represents, oh, such as shovel handles, hammer handles, repairs of small hand tools, and replacement of expendable tools.

Q. And the amount of that is how much?

A. \$196.31.

Q. Now, your next item?

A. That's equipment repairs and maintenance.

Q. What items go to make up that heading?

A. That's repairs and maintenance of equipment that is on the job. That is made up of repairs that

(Testimony of L. R. Hendershott.)

were made on the equipment while those pieces of equipment were at Roza.

Q. I didn't get the last part of your answer.

A. I say, that is repairs on the equipment while it was on the Roza project, in the amount of \$1761.78.

Q. All right; now, your next item?

A. That's gasoline, which would be for the trucks, mixer, cars, that were on the job. That is \$1990.69.

Q. And your next item?

A. Is oil for the same equipment, \$83.98.

Q. And the next item? A. Is form oil.

Q. Do you know what that is?

A. It was my understanding it was the oil used on the forms to facilitate the removal and to leave better structures; [1375] the amount is \$99.92.

Q. And the next item you show is what?

A. Is hardware; that includes nails, she-bolts, and miscellaneous hardware that was required to be furnished by the Concrete Construction Company.

Q. And that amount totals——?

A. The amount is \$405.18.

Q. Now, your next item?

A. Metal pipe plugs, which were sheet metal cones made up to use on the job. The amount was \$83.50.

Q. All right, your next item?

A. Was Hunt Process and Sealcure, \$431.80.

Q. Do you know what that is, Mr. Hendershott?

(Testimony of L. R. Hendershott.)

A. I know what I've been told, but I don't think that's good.

Q. Your next item is what?

A. Sisalkraft paper.

Q. Do you know what that is?

A. When I inquire as to why it was used on the job, it was used as——

Mr. Holman: Oh, I object, your Honor, as to any reasons.

The Court: I think that would be hearsay.

Q. I just wondered if he knew of his own knowledge. All right, what was the amount expended for that? A. \$69.60. [1376]

Q. All right, the next item?

A. Is batching, which is the mixing of the aggregate, \$2780.62.

Q. The next item?

A. Lumber for cement shed, \$2.60.

Q. And the next item?

A. Is roofing for the cement shed, \$23.50.

Q. All right; now, your next item is travel?

A. Travel.

Q. And what's the total amount shown opposite travel? A. \$67.57.

Q. And what does that item consist of?

A. That was expense accounts of various ones of the Portland people that came on the job.

Q. All right; now, you have an item of miscellaneous. Would you give the amount of that?

A. Miscellaneous is \$144.21.

Q. And what, in general, does that cover?

(Testimony of L. R. Hendershott.)

A. Well, there was rental of a post office box at Sunnyside, telephone calls between Sunnyside and Portland, films and developing on pictures, first aid supplies; I noticed several snake-bite kits.

Q. Several what? A. Snake-bite kits.

Q. Snake-bite kits? [1377] A. Yes.

Q. Anything else you can recall that you have in that item?

A. No, not in particular. I think that pretty well covers it.

Q. Now, the next item?

A. Is the premium on the bond, \$393.90.

Q. What bond was that?

A. Performance bond to the Glen Falls Indemnity Company.

Q. Now, your next item?

A. Engineering expense, Mr. C. E. Hewitt's account.

Q. And the next item?

A. Is legal expense, \$533.57.

Q. Whose account is that, or do you know?

A. I believe that was Mr. McKelvey's account.

Q. Now, those amounts total how much, Mr. Hendershott? A. \$68,447.66.

Q. And what type of cost do you designate those? A. Those are direct costs.

Q. And by that you mean what?

A. Costs pertaining to that particular job alone, and not having any bearing on the other operations of the company.

(Testimony of L. R. Hendershott.)

Q. Now, your next item shown on your exhibit, being plaintiff's Exhibit 63, is what?

A. That's overhead expense. It was based on 20 per cent of the direct cost. The total is \$13,582.82.

Q. What relation does that figure have to \$68,-447.66? A. That represents 20 per cent of it.

Q. Now, in connection with your examination, Mr. Hendershott, what examination, if any, did you make to ascertain the actual relationship between Mr. Schaefer's overhead costs for this particular job and the other jobs which Mr. Schaefer had operating at the same time?

Mr. Holman: That, your Honor, I object to as immaterial and outside of the issues. In other words, Mr. Schaefer's other operations manifestly cannot be used to determine an overhead cost for this job.

The Court: Well, what he's trying to get at is what proportion, if any, this job should bear to the total overhead. Overrule the objection.

Witness: On the trial balance of the general ledgers of the company, which is, of course, a recapitulation of the entire year's business, I took the total expense items shown on the ledger, deducted from it the items of direct costs as covered by this recapitulation, and applied the remaining overhead to those direct costs, and determined a percentage which the general overhead bears to the total direct costs on all jobs done during the year by the Concrete Construction Company.

(Testimony of L. R. Hendershott.)

Mr. Holman: I make the same objection, your Honor, and move that the answer be stricken.

The Court: Denied.

Q. And what did you determine by that computation, Mr. Hendershott?

A. For the year of 1944 the percentage was 37.05 per cent, and for the first five months of 1945 the percentage was 19.66 per cent. Taking the total of the 17 months, the percentage was 30.54 per cent.

Q. Well, then, you have charged on your statement against this job only 20 per cent?

A. 20 per cent, yes.

Q. Would that mean that you have charged to overhead on this job more, or less, than what your computation showed was actually attributable to the job?

A. I've charged a third less than the actual overhead incurred during the period the job was in progress.

Q. Now, then, in your exhibit did you total those two figures?

A. Yes, that makes a total of \$82,030.48.

Q. Before we go to this, Mr. Hendershott, in this overhead expense, 20 per cent of direct cost, is there any item included in that for Mr. Schaefer, that is, a drawing account?

A. Yes, in the general overhead there is a monthly salary set up for Mr. Matt Schaefer.

Q. And how much is that? [1380]

A. \$325.00 a month.

Q. \$325.00 a month?

A. Yes.

(Testimony of L. R. Hendershott.)

Q. Explain how that charge relates to this particular project, or how much of it, or whether or not all of it is charged to this Roza Project job.

A. Well, the total costs on this job, direct costs, are \$68,447.66, and the total direct costs on all operations during that same period are \$189,113.16, and that is roughly, the Roza Project represented roughly 31 or 32 per cent of the total direct costs, therefore about 31 or 32 per cent of Mr. Schaefer's salary would be included in that overhead figure; I mean around \$100.00 a month.

Q. Well, now, do I understand that of Mr. Schaefer's drawing account of \$325.00, that there is charged to this job 30 some per cent instead of the 20 per cent? I wasn't quite clear.

A. Well, the pro-ration of the expense on this job, I mean the pro-ration of the direct costs of this job to the total direct costs of all operations represents about 31 or 32 per cent on this job. However, there is another point to be taken into consideration, that is, that I didn't charge on this job the full amount of the overhead as shown by the statement; as shown by the books, I should say. [1381]

Q. Well, how did that affect this \$325.00 a month?

A. Well, had the whole entire 30 per cent overhead been charged against this job, then approximately \$100.00 a month of that \$325.00 would be charged to this job.

Q. Then how much have you actually charged to this job?

A. I'd have to figure it out; I don't know.

(Testimony of L. R. Hendershott.)

Q. Did you use this 20 per cent figure?

A. I used the 20 per cent figure, yes.

Q. You mean in order to give me the exact amount in dollars and cents you would have to figure it out?

A. Yes, that's right. There would be some small proportion of it.

Q. Now your profit, 10 per cent, will you explain that figure?

A. That is 10 per cent of the total direct and indirect costs. The overhead is regarded as indirect cost. It is 10 per cent of the total of the direct and indirect costs; it amounts to \$8203.05.

Q. And that makes a total figure of how much?

A. \$90,233.53.

Q. And that figure represents what in your examination, Mr. Hendershott?

A. I don't understand the question.

Q. What is that figure supposed to indicate, as far as your examination? [1382]

A. That's the total costs, including profit, on the job.

Q. All right. Now, your payments received is your next item shown there. How much did the books and records show had been paid?

A. \$32,614.66.

Q. Now, you've got another figure there, another column, "retained percentage." Would you explain that?

A. That's the 10 per cent of the monthly estimates which was retained by the prime contractor.

(Testimony of L. R. Hendershott.)

Q. Did you give the amount there?

A. No; \$2939.46.

Q. All right; now explain your next computation.

A. The accumulated balance due without retainage is the difference between the \$90,233.53 and \$32,614.66, in the amount of \$57,618.87.

Q. And your next item is what?

A. Is interest at 6 per cent on the accumulated monthly balances, computed to November 1, 1945, I believe—yes. Computed to November 1, 1945, in the amount of \$3,745.57.

Q. What rate of interest did you figure that at, Mr. Hendershott?

A. One-half of 1 per cent a month, or 6 per cent per annum.

Q. Then your next and final figure there, "Total due Concrete Construction Company from Macri and Company," \$61,364.44, represents—— [1383]

Mr. Holman: Your Honor, I move that that portion of the exhibit be deleted and stricken, as the conclusion of the witness upon the very matters that are determinative before this Court. I have in mind the exact wording of that. There's nothing above it, may it please the Court, that shows anything about Macri and Company at all, then they wind up with the label that this is due the Concrete Construction Company from Macri and Company.

The Court: I think that wording is an objectionable conclusion. I think the figures may stand there.

(Testimony of L. R. Hendershott.)

Mr. Holman: Yes, but I'm talking about that label.

The Court: Strike out everything but the word "total" or "balance" or something of that sort.

Mr. Olson: Well, that is our contention, that it is due from Macri and Company. I don't think your Honor in reading this is going to be misled. That is our position. Counsel's position is to the contrary. I don't wish to offend counsel.

The Court: Well, it isn't mis-leading, but I think it is objectionable if it is objected to, and it is.

Mr. Holman: Wouldn't the word "total" or "balance" do?

The Court: Yes, I think so, and strike out the rest of it. I think the wording to which Mr. Holman had reference is the wording on the last item appearing at the [1384] bottom of the left hand side, that reads "Total due Concrete Construction Company from Macri and Company." Just strike out everything following the word "total."

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Hendershott, the item of \$61,364.44, which will now appear as being opposite the word "total," what does that figure then indicate?

A. That is the total unpaid cost on the Roza Project, 1062, including interest to November 1, 1945.

(Testimony of L. R. Hendershott.)

Q. All right; now, getting back to your figure of payments received, \$32,614.66, did your examination reveal, Mr. Hendershott, whether or not those were payments all made direct to Mr. Schaefer, or does it include payments made for his account?

A. All the payments listed with the exception of the \$3018.41 in the column headed "May 1 to November 1" were received by Concrete Construction Company. That item of \$3018.41 were payments made for the account of Concrete Construction Company to various vendors, by Macri and Company.

Q. Now, under your item of miscellaneous, did I understand you to say that that item included some film and developing?

A. Film and developing and printing.

Q. And what else did you say that included?

A. Telephone, post office box, first aid supplies.

Q. Are your records available in such shape, Mr. Hendershott, that you could give us the breakdown on that one item?

A. No, they're not right now. I can in a half hour or such a matter after I'm off the stand.

Q. I'd like to have you, before we get through here, Mr. Hendershott, give us the breakdown on that.

The Court: Is that on the miscellaneous item?

Mr. Olson: Yes. You may examine.

Mr. Hawkins: Your Honor, I wonder if we could reverse our order of examination?

The Court: Yes, all right.

(Testimony of L. R. Hendershott.)

Cross-Examination

By Mr. Hawkins:

Q. Mr. Hendershott, these books that you prepared this statement from, who gave them to you?

A. They were given to me by the bookkeeper in the office of the Concrete Construction Company, at the instruction of Mr. Schaefer.

Q. Do you recall the name of the party that gave them to you? A. Charley Boone.

Q. And when did he give them to you?

A. Within a short time prior to November 26, 1945.

Q. And you say they were given to you at Mr. Schaefer's direction? A. Yes.

Q. Were you present when Mr. Schaefer gave Mr. Boone that [1386] direction?

A. Yes, I was.

Q. And Mr. Schaefer told Mr. Boone to give you the original records pertaining to 1062?

A. He told Mr. Boone to give me all the records pertaining to 1062, and any other information which I requested.

Q. Did you request any other information?

A. Yes.

Q. And you obtained that information from Mr. Boone, did you not? A. I did.

Q. And the statement that you've given here is based in part, at least, upon that information which Mr. Boone gave you?

(Testimony of L. R. Hendershott.)

A. I mis-understood your first question, Mr. Hawkins. When I meant that I asked for additional information, I asked for additional records.

Q. Additional records? A. Yes.

Q. And Mr. Boone furnished those records to you? A. He did.

Q. And your statement here, plaintiff's Exhibit 63, is based in part at least upon those additional records?

A. Upon additional records which I requested.

Q. Yes, and the only way that you know that these are the original records is Mr. Boone told you so, isn't that [1387] right, sir?

A. Most, or a big percentage, of the invoices are from firms in this general locale, and bear notations and signatures of people that were on the payroll on this job, as having been received by them and approved.

Q. You're familiar with all of those signatures, are you?

A. I'm not a handwriting expert, no.

Q. No. That is, this payroll and these other documents were furnished to you by Mr. Boone?

A. That's right.

Q. And he stated to you what they were?

A. That's right.

Q. And it is upon his statement that you make the statement here in court that these are the original records of the Concrete Construction Company? A. To my best belief, they are.

Q. Your belief, however, is founded upon Mr. Boone's statement?

(Testimony of L. R. Hendershott.)

The Court: If there is any serious question about these being the original records of the Concrete Construction Company, can't Mr. M. C. Schaefer get on and say they are?

Mr. Olson: In my order of proof I have that down, to have him so testify. I can again put him on out of order. [1388]

The Court: Let's not waste a lot of time on cross-examination to show that those are the original records.

Mr. Hawkins: I'm sorry I'm prolonging or making an unnecessary cross-examination.

The Court: I'm not saying it is unnecessary at this stage; perhaps we can shorten it by showing that they are original records.

Mr. Olson: I have in mind putting him on.

Mr. Hawkins: That may be. I just want the record to show at this time that Mr. Hendershott's knowledge is based upon information furnished by Mr. Boone, and his knowledge is based upon what Mr. Boone said they were. If counsel is unable to establish the originality of these records, it might be of benefit to my client.

The Court: I'm not questioning the propriety of your examination at this stage.

Mr. Olson: They are original records, and of course it is obvious that Mr. Hendershott wouldn't have any personal knowledge except from Mr. Schaefer.

Mr. Hawkins: That's what I want to get in the record. That being in the record, that's fine.

(Testimony of L. R. Hendershott.)

Cross-Examination
(Continued)

By Mr. Hawkins:

Q. Now, Mr. Hendershott, with reference to this item of miscellaneous, you have in there post office box and telephone. Now, normally, aren't those two items generally [1389] listed under overhead expense?

A. That is a post office box at Sunnyside, at the job location.

Q. And the telephone, someone told you that was the telephone at Sunnyside?

A. That is long distance calls only, between Sunnyside and Portland.

Q. I see. Now, then, with reference to the item of film, I take it that's in connection with these pictures that were introduced in evidence here?

A. I assume so.

Q. Is that right? And this engineer expense item, I take it that is in reference to preparation of this case for trial?

A. That's Mr. Hewitt's statement.

Q. Yes, and do you know whether that was in connection with the actual performance of a job?

A. No, I don't know definitely that it was.

Mr. Olson: Your Honor, if it will shorten that, we'll concede that figure to Mr. Hewitt was for his

(Testimony of L. R. Hendershott.)

services in making the examination to which he testified in court.

The Court: That's \$201.25?

Mr. Olsen: Yes.

Q. Now, with reference to the item of legal expense, do the [1390] records show that is in connection with the preparation of this case for trial?

A. It is for legal advice during the time this job was in progress.

Q. Do you know the dates that that legal advice was rendered?

A. No, I don't know, offhand.

Q. Do you have the original bill in your file?

A. I believe I have.

Q. Could you secure that without too much difficulty? Not right now, but I mean later?

A. Yes.

Q. Will you do that, sir? A. I will.

The Court: I wonder if it might not be wise for the witness to make a note of these things? There may be a good many requests. Here's a pad.

Q. Now, in figuring this overhead you've taken a flat percentage of 20 per cent? A. Yes.

Q. Is that common in the concrete industry, or how do you arrive at that figure?

A. No, it is customary in making a cost statement to take the actual overhead of the concern. It just so happened that in this instance that to me, this 30 per cent seemed unusually high, because there hadn't been enough work [1391] during the

(Testimony of L. R. Hendershott.)

period this job was in process to balance the fixed overhead.

Q. Now, what do you mean by 30 per cent? Where did you get that figure?

A. That's the pro-ration of the overhead expense to the direct costs on all jobs throughout the operation, during the period from January 1, 1944, to May 31, 1945.

Q. Of the Concrete Construction Company over all of its projects?

A. Over all operations.

Q. I see.

A. And there was another point in arriving at that 20 per cent——

Q. That is, the whole thing was 30 per cent?

A. That's right.

Q. The actual overhead cost was 30 per cent of the direct costs of all operations?

A. That's right.

Q. Do you have the records of all operations here with you?

A. I have the general ledger; trial balance of the general ledger, I should say.

Q. The original records, however, you don't have them?

A. Yes, the original trial balance.

Q. But I'm referring to the books of original entry, let me put it that way. [1392]

A. Yes, I have.

Q. Of all jobs?

A. I have—beg your pardon, not the individual

(Testimony of L. R. Hendershott.)

job costs on all jobs. I have the general ledger and the purchase journal and the cash receipts and disbursements and so forth, that go to make up the original records of the company.

Q. That's what I was getting at. You have those books which summarize? A. Yes.

Q. But you don't have with you the books of original entry?

A. Those are the books of original entry.

Q. Your ledger is, sir?

A. I didn't say ledger. I said the purchase journal, cash receipts and cash disbursements are the books of original entry in any business.

Q. Yes; and you have those here with respect to all jobs? A. I have.

Q. And you cut down this figure to 20 per cent, is that right, sir? A. Yes.

Q. And that was done on the theory that 30 per cent was too high? A. It is.

Q. And how did you arrive at that conclusion, sir? [1393]

A. Well, for one thing, 20 per cent was the overhead used by Mr. Schaefer in making up his original estimate on this bid on this job.

Q. Is that where you got the 20 per cent figure?

A. That was one thing that governed my judgment that 20 per cent was adequate.

Q. And is 30 per cent out of line in the industry?

A. I would say that in the construction industry 30 per cent overhead is out of line, yes.

(Testimony of L. R. Hendershott.)

Q. And would indicate inefficient management?

A. No.

Q. Not necessarily? A. No.

Q. It might, however?

A. It would indicate that the jobs that they happened to get involved in did not allow them to operate in an efficient manner, and that they couldn't expend the direct costs in proportion to the facilities that they had, over a period of time.

Q. In other words, it would indicate that something was wrong some place.

A. Something was wrong, definitely.

Q. Now, then, with reference to this 10 per cent profit, how did you arrive at that figure, sir?

A. Most cost plus jobs are cost plus 10; that is customary. [1394]

Q. That is the reason you selected 10 per cent here? A. That's right.

Q. Because most jobs in the construction field are cost plus 10 per cent? A. That's right.

Q. In connection with the 10 per cent item, that was not based on any previous experience that Mr. Schaefer had? A. No.

Q. In the concrete business?

A. If you mean whether that was based on his previous operations had netted 10 per cent, no, that didn't have any bearing on it at all.

Q. That had no bearing?

A. However, it had been their practice in the past to bill on the basis of cost plus 10 per cent.

Q. Well, when he did bill or bid on cost plus

(Testimony of L. R. Hendershott.)

10 per cent, did he include his overhead expense in his cost? A. Yes, he did.

Q. That was not the actual direct cost plus 10 per cent?

A. Not direct cost, no; that is total cost.

Q. As a matter of fact, Mr. Hendershott, in most cost plus bids isn't it true it is direct cost plus 10 per cent? A. No, sir.

Q. It is not?

A. No. If it is, they ballooned their direct costs.

Q. I beg your pardon?

A. I say, if it is, they have ballooned their direct costs.

Q. Now, then, I notice on the fourth line from the bottom you have "Accumulated Balance Due without Retainage?" A. Yes.

Q. Now, what do you mean, balance due? Is that shown on the records of the Concrete Construction Company?

A. No, not as that figure, no.

Q. All that that means, actually, is the excess of the so-called costs over the amount received in that particular month? A. That's right

Mr. Holman: Your Honor, again I move that word "due" be stricken for the same reason previously assigned, in view of the witness's answer.

The Court: Well, let's see; if we strike out the word "due" on there, it might serve the purpose; "Accumulated Balance without Retainage." That's on the third item from the bottom. All right, you may proceed.

(Testimony of L. R. Hendershott.)

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Then that line shows merely the difference between the amount expended as shown by the books that you examined, and the amount received?

A. That's right.

Q. And it also includes the 20 per cent overhead and the [1396] 10 per cent profit?

A. It does.

Q. Now, then, this interest of 6 per cent on the balance, as I understand it you have figured interest on the sum of \$1960.07 from March, 1944, until November 1, 1945, is that right? Referring to the first column of March? A. Yes.

Q. You'll notice that figure there, \$1960.07?

A. That's right.

Q. Now, then, in figuring your interest, you took 6 per cent on that figure from March 1, 1944, until November, 1945?

A. If you will follow the interest line, taking the March, \$1960.07, under the April column there is interest there of \$9.80, which is one half of 1 per cent of that \$1960.07?

Q. Yes.

A. In computing the interest you have to go back to the previous month's accumulated balance.

Q. Now, then, the figure of \$22.13 is interest on \$1960.07 for one month, and \$4426.53——

(Testimony of L. R. Hendershott.)

A. That \$4426.53 is an accumulated balance, which is the \$1960.07 plus.

Q. Oh, I see, that is an accumulated balance?

A. That is an accumulated balance, and there is one half of 1 per cent taken the following month on on the accumulated [1397] balance.

Q. Now, then, on the books of the Concrete Construction Company which were furnished you by Mr. Boone, was there entered any item for overhead expense, sir?

A. The actual overhead as incurred.

Q. I beg your pardon?

A. The actual overhead as incurred.

Q. For all jobs, however?

A. For everything.

Q. But not as to this job?

A. Not as to this particular job.

Q. And with reference to the item of profit, that's not shown on the books that were furnished you either, is it? A. No.

Q. And with reference to the item of accumulated balance without retainage, that was not shown either, was it? A. No.

Q. And with reference to the item of interest, 6 per cent on said balance, that was not shown on those books either, and with reference to the final total, that doesn't show on their books either, does it? A. No, it doesn't.

Q. In other words, their books do not show any amount due them of \$61,364.44? [1398]

A. No.

(Testimony of L. R. Hendershott.)

Q. That's merely a computation that you have made? A. That's right.

Q. And you prepared this statement under Mr. Schaefer's direction, did you not?

A. Pardon?

Q. You prepared this statement at Mr. Schaefer's direction? A. At his request.

Q. At his request?

A. Not at his direction.

Q. Well, he requested you to do it; he didn't tell you how to do it? A. That's right.

Q. Did he state why he wanted this prepared?

A. I don't recall the exact—at that time, his reason; I was pretty well aware of——

Q. Of the situation?

A. ——of what the ultimate use of it would be, yes.

Q. And you anticipated that this would be used in court, or at least in making a claim against Macri and Company? A. Yes, that's right.

Mr. Hawkins: That's all, your Honor.

The Court: We'll recess for 10 minutes.

(Short recess.) [1399]

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

Mr. Hawkins: Oh, by the way, Mr. Hendershott, did you have an opportunity to get that statement of Mr. McKelvey's?

A. No, I didn't get that out of the file.

(Testimony of L. R. Hendershott.)

Cross-Examination

By Mr. Holman:

Q. Mr. Hendershott, you gave some items which you said were paid for Schaefer and Company; I think it was \$3018.41? A. Yes, that's right.

(Whereupon, Letter Shell Oil Co. to Macri dated June 21, 1945, was marked Defendant Macri's Exhibit No. 65 for identification.)

(Whereupon, Letter Central Service Station to Macri, dated July 9, 1945, was marked Defendant Macri's Exhibit No. 66 for identification.)

Q. Handing you identification 65, from the Shell Oil Company to Macri and Company, setting forth a total of \$493.57, is that one of those items?

A. That's the amount of one of the bills.

Q. Yes, sir; now, then, is that item for the oil as billed in your item of gas and oil?

A. If I recall, there was part of the form oil and gasoline and oil that were purchased from Shell Oil. I don't know [1400] that that statement, without analyzing it as to exactly which of those items or not, what amounts they cover.

Q. Well, directing your attention to the wording of the second paragraph of the transmittal letter, doesn't that explain what that's for?

A. No, it doesn't.

Q. What is there in your figures that identifies whether this \$493.57 is included in the gasoline and oil or is not?

(Testimony of L. R. Hendershott.)

A. The total of the bill is included in the total costs. As to the particular designation, I would have to go back to the individual invoices and analyze it.

Q. Yes, sir; then what is there to indicate that it is also in the \$3018.41 item.

A. It is in there.

Q. In other words, it is in there in two places, is it not?

A. In one place as a charge, and another place a receipt of payment from Macri and Company.

Q. Yes, that is, a credit of payment by Macri of \$493.57 of gasoline and oil?

A. That's right.

Q. Then the total gasoline and oil figured up there should be short in that amount?

A. No, sir, not unless you take that amount out of the payments of \$32,000 we have credited him with. [1401]

Q. Then, with reference to this communication from the Central Service Company, identification 66, an itemized bill from January through April, 1945, where is that? Is that part of the three thousand odd dollars that I called to you as payment?

A. That is credited to Macri as a payment.

Q. Where is it charged?

A. Well, I see running through here, there is some gasoline, some oil, some repairs.

Q. Would you answer my question? Where is it charged on your books?

(Testimony of L. R. Hendershott.)

A. Well, I say, there is gas, and oil, and repairs, there is three items.

Q. Well, do I understand, for instance, that you took the Central Service Station bill and broke it up into the various items? A. That's right.

Q. And then similarly, you claim you took the Shell Oil Company bill and broke it up into the several items? A. That's right.

Q. In other words, you had these bills, but they were not paid? A. That's right.

Q. And then the order was given to Macri and Company to pay them? [1402]

A. They had been paid by Macri and Company before I made my examination.

Q. Oh, did you make your examination, then, before or after the State of Washington commenced an action for the non-payment of the industrial insurance, social security welfare, and other taxes?

A. According to my records, there was an amount of \$527.30 paid to the Department of Labor in Washington.

Q. By whom? A. By Macri.

Q. That was after suit, was it not, after a suit and a writ of garnishment?

A. I don't know about that.

Mr. Olson: I submit that isn't proper cross-examination. He can ask when it was paid, if he wants to.

Q. Well, when was it paid?

A. Sometime, according to the record, prior to May 30, 1945. I don't know the exact date.

(Testimony of L. R. Hendershott.)

Q. And then there was an additional amount paid by Macri and Company, was there not?

A. To——

Q. The State of Washington.

A. The Washington Unemployment Compensation Commission.

Q. How much was that? [1403]

A. \$359.22. I don't know the division offhand; there was \$9.05 interest.

Q. And those both had been paid before you made your audit? A. They had.

Mr. Holman: Counsel, I wish to call for the production of Mr. Schaefer's copy of the notice of levy by the United States of America.

The Court: I didn't get what that was.

Mr. Holman: Notice of levy, your Honor. We've affirmatively pleaded it in our answer, United States of America and the State of Washington.

Mr. Olson: You mean you're asking for that now?

Mr. Holman: Yes, sir.

Mr. Olson: I don't think that is proper cross-examination of this witness. I don't know what it's got to do with Mr. Hendershott's examination.

(Whereupon, notice of levy by United States against Schaefer was marked Defendant Macri's Exhibit No. 67 for identification.)

(Testimony of L. R. Hendershott.)

Cross-Examination
(Continued)

By Mr. Holman:

Q. Handing you what has been marked Macri's Identification 67, "Notice of Levy" specifying the amount of \$10,224.95, and the items thereof, will you inspect that, please, and tell me whether or not you included that or any parts of that in your compilation? [1404] A. Of this?

Q. Pardon me; first, do you include that or any part of it in your compilation?

A. That needs explanation, your Honor, before I can answer that. I can't say yes or no.

Q. Well, can you tell me whether you included any part of it in your compilation, then you can make all the explanation you want, sir.

A. There would be part of it included.

Q. Yes, sir; now, will you explain?

A. This notice of levy is for unpaid taxes, income tax, with-holding, social security, federal excise, and income tax, covering the period that this job was in progress and subsequent, and represents the total liability of the Concrete Construction Company as of this date for those items on all operations, not particularly on this one.

Q. Now, then, can you tell me, please, how much of the total amount distrained for is represented on the Roza job? A. No, I cannot.

Q. Why can't you?

Mr. Olson: Objected to as wholly immaterial,

(Testimony of L. R. Hendershott.)

how much of this distraint is represented on the Roza job. I don't see what it has to do with this case at all.

The Court: Is that a distraint filed against [1405] Macri?

Mr. Holman: Yes; "You are hereby notified that there is now due and owing from Schaefer and Company," so many dollars. Now, my question is, what portion of that, if he can say from his compilation, is due from the Roza job, and he says he can't answer; that's correct, is it?

A. That's right.

Q. Did you have made available to you in advance of making your compilation the breakdown of the labor on the Roza job as disclosed by the—I believe you said Mr. Schaefer's copy of the certified payroll? A. Yes.

Q. By the certified copy of the payroll you mean the payroll which Mr. Schaefer furnished the United States Bureau of Reclamation in connection with the Roza job? A. That's right.

Q. Did you any breakdown of that payroll with respect to the allotments of charges to the respective operations? A. No, sir.

Q. Then you had nothing before you to indicate the number of hours, for instance, spent in pouring concrete?

A. That is on the daily manifests which were available to me, but I did not make use of that information.

(Testimony of L. R. Hendershott.)

Q. I see; you had that information available but did not [1406] make use of it?

A. That's right.

Q. And did you have information available as to the number of man hours expended on excavation or fine grading?

A. There were notations on the manifests, but I did not make any use of that.

Q. What do you mean by manifests?

A. The daily report from the superintendent on the job.

Q. Oh, yes. Then when did you start making your audit,—pardon me, we don't use the term "audit" here; what do you call it, your compilation?

A. Examination; November 26.

Q. That's the date of your letter. How long before that had you started working on it?

A. Oh, it was probably over a period of—just guessing, now, 30 days.

(Whereupon, Letter Schaefer to Macri, August 14, 1945, was marked Defendant Macri's Exhibit No. 68 for identification.)

(Whereupon, Letter Schaefer to Macri re extras, to Jan. 31, 1945, was marked Defendant Macri's Exhibit No. 69 for identification.)

Q. Handing you what has been marked Macri's identification 68, I'll ask you if a copy of that was made available to you for the purpose of reflecting itself in your compilation? [1407]

A. I have seen this statement; whether it was before or after my examination I don't know.

(Testimony of L. R. Hendershott.)

Q. Well, then, I'll show you Macri's 69, calling your attention to the date of the transmittal letter, August 14; did you see that compilation attached to that, sir?

A. Now that you show me two, they differ in some respects; I've seen one or the other, and I don't know which.

Q. Now, isn't it a fact that you made the computations to arrive at these figures, or not?

A. No, I did not.

Q. Well, is it a fact that these computations as reflected by identifications 68 and 69 were available and before you at the time you made your compilation?

A. No, they were not.

Q. And were you told of them, or not?

A. As I say, I saw one or the other, possibly I've seen both of them, but they were not given any consideration.

Q. Well, that isn't what I asked you, sir, whether they were given consideration or not. Did you have them supplied you as part of the information?

A. No.

Q. Now, did you or did you not make your compilation at the direction of Mr. McKelvey, a lawyer for whom you have charged services there? [1408]

A. No, sir. I have never met Mr. McKelvey, or talked to him.

Q. Never met him; yes, sir. Are you able from your own books and records to indicate the number of man hours that was applied, for instance, on roofing the building?

A. No, sir.

(Testimony of L. R. Hendershott.)

Q. Are you able to indicate from your own books the time loss claimed by reason of second-hand lumber? A. No, sir.

Q. Are you able to indicate any item with respect to allocation of man hours with respect to any item of job performance? A. No, sir.

Q. You have no such records here?

A. No, other than, as I mentioned, the manifests, which have not been recapitulated.

Q. Oh, yes; then the first computation made by, through, or under your direction or to your knowledge is the compilation which is in evidence as plaintiff's Exhibit 63?

A. That is the only one which I prepared for the Concrete Construction Company as pertains to the Roza Project.

Q. And I believe you told me that your letter of transmittal was November, 1945?

A. 1945, I believe, yes.

Q. November 26, 1945; and that your work of compilation was [1409] about one month before that?

A. Within the thirty days before that.

Q. Within thirty days before that; you mention in your transmittal letter, do you not, attached to the original of this compilation, that you had before you the contracts. You say "contract with Macri Company." Now, are you referring to the government contract with the Macri Company, or are you referring to the contract between Macri Company and Concrete Construction Company?

(Testimony of L. R. Hendershott.)

A. No, I saw the sub-contract between the Concrete Construction Company and Macri Company.

Q. That's the one, and the only one, you're referred to? A. That's right.

Q. You show in your compilation, do you not, an accumulation of retainage, an amount retained each month? A. Yes, that's right.

Q. Then you charge interest on that, do you not?

A. No, sir.

Q. You do not charge interest on that?

A. Well, I—yes, there would be.

Q. Yes, sir; now, if it is disclosed by the sub-contract that the terms of payment under the sub-contract shall abide the terms of payment under the principal contract, then would the charge of that interest be proper for any time except while Macri held the money after the government [1410] had paid it to Macri?

Mr. Olson: That question is objected to, your Honor, as not being a proper question.

The Court: Read the question over.

(Whereupon, the reporter read the last previous question.)

Mr. Olson: I think it is asking this witness for a legal conclusion.

Mr. Holman: No, I'm asking as an accounting proposition.

The Court: Well, I'll overrule the objection, if he can answer it as an accountant.

(Testimony of L. R. Hendershott.)

Cross-Examination
(Continued)

By Mr. Holman:

Q. I didn't ask you to determine it; I asked you if it would be proper.

A. Not until after the final payment had become due, that's true.

Q. Yes, sir. Now, then, that's what I wanted to get at, sir. In the second column, for April, 1944, you have interest of \$9.80?

A. That's right, sir.

Q. And that interest, as I understand your computation, is at 6 per cent upon \$1960.07 for one month, right?

A. That's right.

Q. Now, is that for the month of March, 1944?

A. That's for the month of April.

Q. Of April, 1944?

A. That's right.

Q. Well, would there be a percentage of that \$9.80 that should not be charged until after Macri had the money from the government and did not pay you on the preliminary or monthly estimate?

Mr. Olson: If your Honor please, I'm going to again object to that line of questioning. It is asking this witness to pass upon an issue of law, because our position is that this sub-contract was abrogated first when Mr. Macri agreed with Mr. Schaefer that they would pay our entire costs under this job. If that be the case any retention under the sub-contract became wholly immaterial and of no force and effect, and when Mr. Macri breached his con-

(Testimony of L. R. Hendershott.)

tract and failed to do the things he agreed to do, namely to excavate and on time, and to furnish lumber and on time, that they again abrogated the contract, and from that moment Mr. Macri became indebted to use for labor and material and service.

Mr. Holman: I have this in mind only: I would like to argue the legal points with counsel at the proper time, but just at present this gentleman in his transmittal letter which is attached to the original answer and cross-complaint—I mean the amended complaint of the [1412] plaintiff Schaefer——

Mr. Olson: Attached to the original complaint, isn't it?

Mr. Holman: Yes, and referred to in the amended, in the first sentence says: "Pursuant to your request I have examined the original records pertaining to the Roza Project contract with Macri," showing he has the contract under consideration, "under Bureau of Reclamation job 1062, and present herewith a statement of costs prepared from the above original records," so the witness has shown by his transmittal letter that he used that contract, and therefore I submit it is a proper question.

Mr. Olson: If he wants to ask what the witness did, that I think is proper, but if he asks whether it should have been done, then he's asking the witness as to what our legal rights are. I think counsel's got a right to interrogate the witness as to what he figured, and so forth.

(Testimony of L. R. Hendershott.)

The Court: Well, I'll overrule the objection.

Witness: Your Honor, may I make a remark here? In regard to that paragraph Mr. Holman just read, that phrase "contract with Macri and Company" does not in particular refer to the sub-contract as pertains to this job, but is merely identifying the portion of the Roza Project on which these costs were incurred. [1413]

Q. But didn't you just a minute ago, Mr. Hendershott, answer me that you had the sub-contract?

A. I have read the sub-contract, yes, sir, but what I'm getting at, Mr. Holman, I did not have that in mind in referring to this phrase as interpreting that sub-contract.

Q. Let me ask you, Mr. Hendershott, did you have before you the monthly estimates of Concrete Construction Company and work performed by them as furnished to them by Macri and Company?

A. I had the——

Q. What they call the progress estimates?

A. I had the voucher portion of Macri Company checks, was where I got the information which indicated the payments and the yardage poured.

Q. Yes, sir; and now, did you not also have the yardage estimates before you, themselves?

A. I don't recall them.

Q. Did Mr. Schaefer furnish you those?

A. I don't recall having seen them, no.

Q. Well, then, as this interest accelerates down through, at your arbitrary rate of 6 per cent, there

(Testimony of L. R. Hendershott.)

is a charge each month for the accumulation of the retained percentages between the time they are retained and ultimately paid by the government, is that correct?

A. Yes, that would be correct. [1414]

Q. Mr. Hendershott, you understood, did you not, from your general accounting experience, you understood that on all public works there is a retained percentage held until final completion and acceptance of the work?

A. Yes, I've seen that on other jobs.

Q. And you understood, did you not, that that retained percentage was added to month by month by month of the additional percentages of the amount determined for that month, the amount certified per month?

A. Yes, that's right.

Q. And notwithstanding that, you charged this interest throughout?

A. That's right.

Q. Now, you say that the item of \$201.25 shown in the month of February, 1945, is an engineering expense of Mr. C. E. Hewitt?

A. That's right.

Q. And that was not expended for the purpose of any propulsion of the job, but for the purpose of preparation for trial data, was it not?

A. That's right.

Q. Well, then, will you tell me, please, whether or not the entry of that item, \$201.25, is a fair and a proper item to reflect to this court the cost of doing that job?

Mr. Olson: If the Court please, I object to that

(Testimony of L. R. Hendershott.)

[1415] question. He's asking for a conclusion of this witness. This witness has made an audit of the books, showing the costs that went into this job. Now, when that item came up I submitted to your Honor exactly what it was.

The Court: I think the question is objectionable, as argumentative. The witness has shown what is included here. Whether it is proper to be in there for the court to determine.

Mr. Holman: I didn't mean to make it argumentative, your Honor, and I concede it is argumentative, and I withdraw the question. I don't want to argue.

Cross-Examination
(Continued)

By Mr. Holman:

Q. Also the item of \$533.57, shown between May and November, which you indicate as legal expense, was not an item expended in propulsion of the work itself, was it? From the books and records; I'm not asking you from memory, Mr. Hendershott; from the books and records.

Mr. Olson: Now, your Honor, I think that's asking for a conclusion of this witness. He can state what the legal expense item is; matter of fact, I'm inclined to think we did hurry this job along, but to ask this witness whether or not this money expended to McKelvey hurried Maceri along on this job is certainly asking this witness to state a conclusion.

(Testimony of L. R. Hendershott.)

Mr. Holman: I don't want the witness's conclusions; [1416] I want whether or not that \$533.57 was a charge while the job was in progress.

The Court: I assume what counsel wishes to bring out is what this witness can say as to the various items as shown on the books. He isn't supposed to know of his own knowledge. Now, if he can answer from the books and records, I think he should. I'll overrule the objection.

Witness: Mr. Hawkins asked me to get that bill and I haven't done it, and until I do I don't know what period it covers.

Q. What I want to know is whether that's off the bill or off the books of the company that that entry is made.

A. It's off an original bill from McKelvey's office.

Q. And you will get that so we can see that, sir?

A. Yes, I will.

Q. Now, for the total items of payments received, in your final column, \$32,614.66?

A. Yes.

Q. I think you answered that that was off of the Concrete Construction Company's cash entries on their books?

A. That's right.

Q. Yes. Did you endeavor to verify that by reference to the checks showing the quantities determined as submitted by Macri and Company?

A. I said a few minutes ago that I had also the voucher [1417] portion of Macri's checks.

Q. Then is it, or is it not, your answer that the

(Testimony of L. R. Hendershott.)

voucher portion of Macri's checks also show \$32,-614.66 paid direct to Concrete Construction Company? A. No.

Q. How much?

A. That includes the \$3018.41.

Q. Oh, I beg your pardon; so it would be——

A. \$29,596.25, I believe.

Q. Where is that figure? A. Pardon?

Q. Where is that figure?

A. That's the difference between \$32,614.66 and \$3018.41.

Q. Would you give me that figure again, please?

A. That would be \$29,596.25, I believe.

Q. Now, in the figure of \$3018.41 which you say are items paid by Macri and Company for the Concrete Construction Company, you means by that, paid on order of the Concrete Construction Company, do you not? A. That's right.

Q. Is it not a fact that there are included at least two court cost items and some attorneys' fees?

A. Not to my knowledge there are not.

Q. I see, you didn't know that, sir?

A. And I don't believe that is true. [1418]

Q. Oh, why do you say that, sir?

Mr. Olson: Your Honor, it is wholly immaterial. We acknowledge receipt of that money, as a credit. Whether or not it was to buy peanuts, if we give him credit on his account, whether it included costs, attorneys' fees or what it included is immaterial. It is not a part of the charge; it is part of the money we give them credit for.

(Testimony of L. R. Hendershott.)

Mr. Holman: This witness has just answered the very thing I was interested in, whether or not he had included in his compilation the items of court costs. If he has, that's one thing.

The Court: You mean as part of the costs of the project?

Mr. Holman: No, as a credit.

The Court: What difference does it make, if it is a credit?

Mr. Holman: If \$3018.41 does not have the court costs in, then that figure naturally would not be a total figure.

Mr. Olson: We stipulated at the pre-trial, didn't we, that \$32,614.66——

The Court: Is the amount paid; is there any question about that?

Mr. Holman: No, there isn't, but I'm trying to [1419] find out from this witness if the \$3018.41 is the total amount deducted to bring this matter to \$29,596.25, or if there were additional amounts deducted. I'll not pursue it any further, in view of the pre-trial, your Honor, but I was not clear on that point.

Cross-Examination
(Continued)

By Mr. Holman:

Q. Will you answer me, please, whether the profit which you have shown at 10 per cent here is representative of the earned profit of the Concrete Construction Company for all of its opera-

(Testimony of L. R. Hendershott.)

tions during the period shown by those compilations?

A. No, I can't answer that offhand; I don't know.

Q. In other words, isn't it a fact that the profit of 10 per cent which you have put in here is an arbitrary 10 per cent adopted by you as your idea of what would be a fair profit?

A. That's right.

Q. And it has nothing to do with any of the books or records of the Concrete Construction Company?

A. Other than the fact that on other cost plus jobs 10 per cent was the customary amount to add, and in other firms where I have access to the books that is also customary.

Q. Yes, on a cost plus job there is a fixed percentage above actual cost? A. That's right.

Q. But as Mr. Hawkins said, it would be the actual costs expended on the job itself, would it not?

A. Included the overhead.

Q. Now, isn't it a fact in all of your experience, and particularly with the government, that the 10 per cent shall pay for the overhead and pay for the bond and pay for those items?

A. No; very definitely no.

Q. In other words, those items are allowed to be charged in? A. They are.

Q. In your fourth item, truck hire, you spoke of that being the rental of a truck? A. Yes.

Q. Where did you get that item?

(Testimony of L. R. Hendershott.)

A. From bills submitted by the truck owner.

Q. And who was the truck owner?

A. I believe the name was Ellis Robinson, or Robertson, I'm not sure which.

Q. In other words, it was not truck hire for a truck of the Concrete Construction Company?

A. No, sir.

Q. Oh, I see. Now, your item of Hunt Process and Sealeure, was that upon a statement furnished you, as a charge?

A. Several individual bills.

Q. Sir? [1421]

A. Several individual bills.

Q. And the same for the metal pipe plugs?

A. Yes.

Q. Now, are those metal pipe plugs part of the she-bolt which is in evidence here?

A. No—I don't feel that I'm qualified to explain the exact purpose of it. I can tell you approximately what they look like.

Q. Never mind; if you're not qualified, sir, we'll pass it. The item of lumber for a cement shed, where did you get that item?

A. Well, that happened to be a little bill that came in that was so marked.

Q. From whom?

A. That I can't tell you without looking.

Q. Well, answer me, was it a bill from Macri and Company for the use of lumber, or was it a bill from someone else?

A. It was from another vendor.

(Testimony of L. R. Hendershott.)

Q. And can you tell me from what source that came; where that lumber came from?

A. I can by looking it up.

Q. Would you do that, please? Oh, pardon me; forget it. A. \$2.60.

Q. We're on the wrong line. It's \$2.60. I thought it was \$23.50, the roofing. [1422]

A. That's the roofing.

Q. I'm not interested in that item, thank you. Now, in classifying the job cost, the labor, did you have before you any distribution of the various jobs occupied by the laborers, such as the superintendent, and the carpenter-foreman, and so forth and so on?

A. It was indicated on the payroll sheets.

Q. You took the payroll sheets only?

A. Yes.

Q. You didn't take the daily record, what do you call this book, the progress record?

A. The daily manifests.

Q. Sir?

A. I didn't compare them, no.

Q. May I ask you, this .024 per hour payroll insurance is what you took as the State of Washington charges, and not an adopted figure by you?

A. No, that's the State of Washington.

Q. That's just what it actually is?

A. That's right.

Q. Now, will you tell me, please, how you determined the item of \$2780.62, batching? How did you get that item?

A. That was from bills rendered.

(Testimony of L. R. Hendershott.)

Q. In other words, somebody else did the batching?
A. That's right. [1423]

Q. And Mr. Schaefer's operation, then, didn't do the batching?
A. No.

Q. And I think in connection with this word "batching" you used some other term; what did you say, batching for what?

A. Batching of aggregate.

Q. Batching of aggregate; will you please get that bill or those bills; and will you also tell me, Mr. Hendershott, whether or not the items of truck hire here are items of hire of trucks other than the Concrete Construction Company equipment?

A. I answered that a while ago, that they are separate.

Q. Oh, you may have answered it. Then are the equipment repairs and maintenance items which are shown charged, items which the Concrete Construction Company paid out, or are they allotments of labor time?

A. They're actual paid-out items.

Q. Those also would be on vouchers?

A. Yes.

Q. Or statements. Thank you.

Mr. Holman: I think that's all, your Honor.

Cross-Examination

By Mr. Ivy:

Q. Mr. Hendershott, in your examination of the original records, did you find any segregation made on the Concrete Construction Company's books that

(Testimony of L. R. Hendershott.)

would indicate extra [1424] items charged over and above the contract?

A. No, sir, there is no segregation on the books.

Mr. Ivy: That's all.

The Court: Do you have any redirect examination? I assume it will be necessary to have this witness available in the morning, unless he can look up these items now.

Mr. Olson: We'll have him available.

The Court: You'll have him available in the morning?

Mr. Olson: Are we going to go to 4 o'clock, or 4:30?

The Court: We'll go to 4 o'clock today. I might say, if there is anything else you want this witness to bring in, you might tell him now, so he can look them up.

Witness: Your Honor, I'll be in the court until the trial is over.

The Court: All right.

(Whereupon, the Court took a recess in this cause until Tuesday, March 11, 1947, at 10 o'clock a.m.) [1425]

Mr. Olson: Then we've got twelve minutes. I'll call Mr. Macri, as an adverse witness, under the rule.

SAM MACRI

called as an adverse witness, on behalf of the plaintiff, being first duly sworn, testified as follows:

The Court: I would like to request counsel to conduct this examination slowly, and Mr. Macri to answer slowly and as plainly as he can, because it is obviously going to be difficult, on account of Mr. Macri's accent, to understand him, and we'll have to work that out as best we can. You may proceed.

Direct Examination

By Mr. Olson:

Q. Your name is Sam Macri?

A. Yes, sir.

Q. You're one of the defendants in this case?

A. Yes.

Q. Now, Mr. Don Macri is your son?

A. He is.

Q. And Mr. Joe Macri is your brother?

A. He is.

Mr. Holman: Your Honor, isn't this all settled in the pre-trial? I thought so.

Mr. Olson: I was under the impression that you went to some length, Mr. Holman, to deny my allegation that Macri and Company, insofar as this case was concerned, consisted of the three Macris and A. J. Philp and Mr. Goerig. [1426]

Mr. Holman: All right, to save time.

Mr. Olson: I don't like to spend any time on it if it is conceded.

(Testimony of Sam Macri.)

Mr. Holman: There's been no pre-trial so far as Macri and Company partnership is concerned.

Mr. Olson: That, and the relationship of Mr. Goerig and Mr. Philp.

Mr. Holman: That's different. That was not conceded.

The Court: The relationship of Mr. Goerig and Mr. Philp to the Macris?

Mr. Olson: Yes.

The Court: Well, that's controversial; I don't think we could reach any agreement on that, probably.

Mr. Hawkins: I understood the joint venture agreements were stipulated to.

The Court: Aren't they in evidence here?

Mr. Olson: I'll say this, your Honor; what I wish to show by Mr. Macri is that Sam Macri, Don Macri, and Joe Macri are co-partners, doing business as Macri and Company, and that the relationship insofar as this case is concerned of that Macri Company with A. J. Goerig and Clyde Philp is as shown by the joint venture agreement that is in evidence. If that's conceded by counsel——

The Court: And the agreement terminating the joint [1427] venture?

Mr. Olson: No.

The Court: Is there no question about that?

Mr. Holman: Nothing changed, sir; there just can't be.

The Court: If there is no question about it, then that is agreed.

(Testimony of Sam Macri.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Then, Mr. Macri, showing you plaintiff's Exhibit 5, being a sub-contract bearing the signature of Macri and Company, by Sam Macri, and Concrete Construction Company, by M. C. Schaefer, you had that contract prepared, did you not, Mr. Macri?

Mr. Holman: Just a minute. Your Honor, that's also covered in the same way.

Mr. Olson: Oh, no.

The Court: What is the identification?

Mr. Olson: Exhibit 5.

The Court: That's the sub-contract?

Mr. Olson: On 1062.

The Court: Well, I'll permit him to answer.

Mr. Olson: If counsel concedes it, I won't waste any time on it, if he concedes that Mr. Macri had this prepared.

Witness: Yes, I had this prepared. [1428]

Q. You had that prepared?

A. When Mr. Schaefer's present; Mr. Schaefer was over there when we prepared this.

Q. I'm not asking if Mr. Schaefer was present when it was——

A. When we prepared it on this stuff he was present. Mr. Schaefer was present when this was prepared.

(Testimony of Sam Macri.)

Q. Now who, Mr. Macri, typed in the typewritten portion of that Exhibit 5?

A. Well, that was typed in the office.

Q. In whose office.

A. My office.

Q. In your office? A. Yes.

Q. And by whose stenographer?

A. Well, there was two or three people in the office there.

The Court: Try to speak up a little.

(Whereupon, the reporter read the last previous answer.)

The Court: The question was "who typed it?"

A. One of the people in the office typed it.

Q. In your office? A. Yes.

Q. Now, where did you get that printed form, Mr. Macri?

A. Well, this sub-contractor form, we've been using for all sub-contracts. [1429]

Q. Not so fast.

A. That's a regular sub-contract form that we had, already printed.

Mr. Olson: I ask that that be stricken as not responsive. My question is "Where did you get that form?"

Mr. Holman: I submit he has answered it.

(Whereupon, the reporter read the last previous answer.)

The Court: I think that answers it, doesn't it?

(Testimony of Sam Macri.)

Mr. Olson: Well, he says it is the regular form that he was using.

Q. In other words, Mr. Macri, that's your form of contract, is it not?

A. This was prepared, who it was prepared it I don't know. I think that was prepared for somebody and we had them in the office ourselves, we bought some of this sub-contractor form.

Q. You're the one that selected that form of contract for use in this agreement signed between yourself and Mr. Schaefer?

A. We used it for all sub-contracts.

Q. And you also, Mr. Macri, you on behalf of Macri and Company selected it for this particular job?

A. For every job.

Q. Including this one? [1430]

A. Including this one. Mr. Schaefer went over this before it was signed, this sub-contract.

Mr. Olson: I ask that be stricken as not responsive.

The Court: It will be stricken.

Q. Now, showing you plaintiff's Exhibit 6, Mr. Macri, which is the sub-contract on 1068, you also selected that contract, did you not?

A. Same form we had, yes.

Q. And you selected it?

A. Well, I don't know if I selected it. That's the same form we had in the office.

Q. Mr. Schaefer didn't bring that contract to your office, did he?

A. No, we had them.

Q. Pardon?

A. We had them ourselves.

(Testimony of Sam Macri.)

Q. And that contract also was prepared in your office? A. Yes.

Q. And by whom? A. By both of us.

Q. Isn't it a fact, Mr. Macri, that you personally had each of those contracts prepared before Mr. Schaefer saw them?

A. Not until he had accepted the proposition, no.

Q. And then you prepared—in other words, after you and Mr. [1431] Schaefer had agreed as to your price, you then prepared each of those contracts 5 and 6 for Mr. Schaefer's signature?

A. This contract was already prepared; we agree, Mr. Schaefer and I, we agree what we're going to put in it, then when came back tomorrow, if it is satisfactory, we both sign.

Q. But you put it in?

A. With his permission, naturally, he agree with me.

Mr. Olson: I ask it be stricken as not responsive.

The Court: Try to answer the questions directly. I think I know what's he's testified to.

Q. Mr. Macri, after you agreed with Mr. Schaefer as to the price that he was going to do this work for, you then prepared each of those contracts, being Exhibits 5 and 6?

A. Was prepared in the office.

Q. By you?

Mr. Holman: I submit it's been answered two or three times, your Honor, by somebody in his office.

The Court: Well, there is some question about

(Testimony of Sam Macri.)

it. He doesn't answer very directly. If he wouldn't try to make so many explanations, and answer the questions——

Witness: That was prepared in my office.

The Court: In your office.

Mr. Olson: He said by him, didn't he? [1432]

The Court: Well, I don't think that he typed it out. It was prepared in his office by someone under his direction.

Mr. Olson: I don't want Mr. Holman saying Mr. Schaefer prepared it.

(Whereupon, the reporter read the last previous answer.)

Q. Was it prepared by you, or by someone under your direction in your office?

A. There was a fellow by the name of Hjorth handled all this sub-contract; he was our estimator.

Q. And who is Mr. Hjorth, your estimator?

A. He used to be.

Q. He was then? A. Yes.

Q. He was your employee? A. Yes.

Q. And he had that contract typed up in your office?

A. After we agree, yes, and tell him what to put in it.

Q. After they agreed, then your employee had that contract typed up?

A. Yes, this was typed in our office, there isn't any question about that.

Mr. Olson: Your Honor, he invariably comes back, says "It was typed in our office." I think

(Testimony of Sam Macri.)

he can answer [1433] that question. It's a simple question. He just obviously doesn't want to do it.

Mr. Holman: I think that's not correct. I think the witness is trying to answer exactly what was done.

The Court: Well, try again. Who typed it up, if he knows.

Witness: Can I explain, your Honor, the way it was done?

Q. Just answer my question, Mr. Macri. Was that contract dictated on the form which you testified you had in your office, was the typewritten matter, was that dictated by one of your employees, by someone working for you?

A. Yes, it was typed by our bookkeeper, but this Mr. Hjorth would tell him what to put in, and he put the words in.

Mr. Olson: Thank you. That's all.

The Court: Is there any cross-examination?

Mr. Holman: I think not now, your Honor.

The Court: Well, we'll adjourn, then, until tomorrow morning at 10 o'clock.

(Whereupon, there being no further questions, the witness was excused.)

(Whereupon, the Court took a recess in this cause until Tuesday, March 11, 1947, at 10 o'clock a.m.)

Yakima, Washington, Tuesday, March 11, 1947,
10 o'Clock A.M.

(All parties present as before, and the trial
was resumed.) [1434]

L. R. HENDERSHOTT

a witness called on behalf of the plaintiff, resumed
the stand and testified further as follows:

Mr. Holman: Further direct?

Mr. Olson: Partly, and partly that that I asked
him to look up yesterday.

Redirect Examination

By Mr. Olson:

Q. Mr. Hendershott, yesterday you were referring to the item that is designated miscellaneous on plaintiff's Exhibit 63. Have you had an opportunity to determine the breakdown of the various items included in that account of miscellaneous?

A. I have analyzed the account and have the detail on all except three items during the course of the job.

Q. Now would you give me the items that you've got there? A. Starting in March——

Q. Just give us the totals, if you can.

A. I don't have them in totals. I have them in detail only.

Q. Well, you've got quite a few figures, then?

A. Yes, I have.

Q. How much time would it take, Mr. Hender-

(Testimony of L. R. Hendershott.)

shott, to add up [1435] so that you can give us just the totals, or are they susceptible?

A. Yes, I can total them, and give you probably a total of 10 or 12 figures covering all the various classifications except for the three items which I have not found. The invoices on these identified them definitely.

Q. I wish you would do that. I think, your Honor, that that will suffice, at least for my purposes. I don't need to know how much each item, each month.

The Court: What is this the detail on?

Mr. Olson: The item of miscellaneous that is in our Exhibit 63.

A. \$144.21, the fourth item from the bottom.

Mr. Olson: In other words, from the item itself you can't tell what it is, and I was going to have him detail as to how much was in each particular item.

Redirect Examination
(Continued)

By Mr. Olson:

Q. Well, then, Mr. Hendershott, referring to your column "Overhead Expense—20 per cent of Direct Costs," I don't believe I asked you to elucidate on just what items went in to make up that overhead expense.

A. Well, there is the general office expense, such as office salaries, office supplies, advertising, dues and subscriptions, insurance, general insurance, light, heat and power in the office, rent, and there

(Testimony of L. R. Hendershott.)

is equipment [1436] items depreciation, the shop and warehouse expense, and general items such as licenses and taxes, telephone, travel, discounts, building repairs, building maintenance; that covers the principal items. There may be, there probably are miscellaneous small items not in that.

Mr. Holman: Postage, telephone, and telegraph?

Q. So that you figured in depreciation on machinery and equipment in your general overhead expense?

A. In the general overhead, yes. That is the only charge made to this job for equipment owned by the company.

Q. Well, is it true, then, that as to the Mixomobile and trucks and things of that kind, that the charge for that equipment is included in this overhead expense?

A. Yes, the depreciation on those equipments is included as part of the overhead.

Mr. Olson: Well, your Honor, that's all I have for Mr. Hendershott except I want to get that miscellaneous total in there.

Recross-Examination

By Mr. Holman:

Q. Mr. Hendershott, you gave in the overhead travel expense, and you have a travel expense item in this detail, in your compilation; is that the portion of the travel expense that's chargeable to this job, or not?

(Testimony of L. R. Hendershott.)

A. No, the travel expense that is included in overhead is general travel that is not allocable to any particular [1437] job.

Q. In other words, then, if Mr. W. E. Schaefer were travelling to San Francisco this job would be charged with part of that?

A. Through the overhead, if it were on company business.

Q. Yes, and I believe you said about 20 per cent of the total overhead, did you not?

A. Well, there is 20 per cent of the direct costs that's charged as overhead.

Q. Well, isn't that a direct cost?

A. Pardon?

Q. That's not a direct cost? That is a direct cost of business, but not of this job?

A. That's right; I mean a trip to San Francisco would not be a direct cost to this job.

Q. And the insurance, you have payroll insurance here; did you have public liability and personal injury insurance? A. Yes.

Q. Well, is that chargeable to this job, or is it chargeable under the proportion?

A. That's chargeable in general overhead.

Q. Although the policy ran specifically for this job? A. No.

Q. Well, that's what I'm asking.

A. No, to my knowledge there was not a specific liability [1438] insurance policy.

Q. Oh, you had blanket coverage?

A. Blanket coverage.

(Testimony of L. R. Hendershott.)

Q. I see, sir; and the building repairs and building maintenance would be on your Portland ownership?

A. On the Portland warehouse and office building.

Q. And did not include any improvements on this job? A. No.

Q. And what was the depreciation you extended for the Mixomobile; how much?

A. I don't have a detailed depreciation schedule with me.

Q. Will you get that, please?

A. It is approximately 10 per cent of the cost per year.

Q. And the Buggymobile? A. The same.

Q. Approximately 10 per cent of the cost per year. Now, was that rate used in the income tax.

A. It was.

Q. Did you have an opportunity to get Mr. McKelvey's bill? A. Yes, I have.

Q. May I have that, please? You have no itemized bill at all? A. No, sir.

Q. And this is not shown paid. Is it a paid bill?

Mr. Olson: I think it's immaterial, your Honor.

Mr. Holman: Well, I think it is material, your Honor. It doesn't even tie it to this job, except in the heading. It's not detailed at all, and there is \$33.00 worth of long distance tolls that do not tie up to this job at all. You have no detailed bill?

A. No, sir.

Mr. Olson: Your Honor, the bill says "To serv-

(Testimony of L. R. Hendershott.)

ices rendered, including reviewing file, conferences, briefing, two trips to Yakima, and all related services;" it is addressed to Concrete Construction Company, Macri and Company, in re sub-contracts 1062 and 1068; disbursements, telephone calls paid; expense of trip to Yakima, \$12.50; \$33.57 advanced, and total, \$533.57. I submit that the bill is as itemized as that generally submitting by professional men for professional services.

The Court: Well, counsel is just cross-examining here; this document isn't in evidence. Proceed with the cross-examination.

Recross-Examination
(Continued)

By Mr. Holman:

Q. You can't tell me, then, Mr. Hendershott, from your own records that you have before you, whether the services Mr. McKelvey rendered were services in preparation of this litigation, or were services rendered for propulsion of the job itself?

A. No, I can't tell you what they were for, other than what [1440] the bill says.

Q. Well, the bill doesn't give any dates?

A. No, that's true.

Q. And you have no dates?

A. I have no dates.

Q. This bill is shown dated October, 1945; you had this bill before you, but you made no inquiry as to that? A. That's right.

Q. You didn't ask for any segregation to de-

(Testimony of L. R. Hendershott.)

termine what was chargeable to this job and what was chargeable to litigation? A. No, sir.

Q. I asked you yesterday with respect to Macri's identification 67, notice of levy for \$10,224.97 due the United States by Concrete Construction Company. Did you do any checking since to find out what proportion of that, if any, is chargeable to 1062?

A. I didn't try to make any segregation of it, because it is my opinion that the whole amount is the result of this job.

The Court: I'm not sure what we're talking about here, Mr. Holman.

Mr. Holman: I'm talking about notice of levy, your Honor, which was served upon Macri and Company. It is Macri's identification 67. I'll bring it in as part [1441] of our case.

The Court: It is not in here as one item?

Mr. Holman: No.

Recross-Examination
(Continued)

By Mr. Holman:

Q. I wanted to know if you show in this compilation anywhere this compilation of this \$10,224.97 item? A. No, sir.

Q. And yet you say that in your opinion as a Certified Public Accountant it is all chargeable to this job?

A. I said it is as a result of this job.

(Testimony of L. R. Hendershott.)

Q. Well, then, would it be chargeable to this job, sir, in fairness?

A. I don't follow your reasoning on that at all, Mr. Holman.

Q. Well, please do not concern yourself about my reasoning. Answer my questions.

The Court: What was the last question?

(Whereupon, the reporter read the last previous question.)

Mr. Olson: Your Honor, I'm not sure what he means, myself.

Q. Well, I'll explain, Mr. Hendershott. Up here for the month of March through the month of April, 1945, you have an item of labor. Now, is the charge which was made to the laborers that is in part incorporated in this levy by the United States included in these charges, or [1442] deducted from it; for instance, take the month of March, 1944.

A. The labor item?

Q. Just a minute, please, let me finish my question; labor, month of March, 1944, \$920.57, is that including the amount that was deducted from the labor to pay the government, or not?

A. Yes, that is the gross amount earned.

Q. Then isn't it a fact that your total labor item is shown at \$53,280.87, correct?

A. Yes, sir.

Q. Now, can you tell me, please, what portion of that \$53,280.87 was collected by Mr. Schaefer

(Testimony of L. R. Hendershott.)

from his labor and has been withheld from the government and included in this levy?

A. No, I can't tell you offhand.

Q. So that the item \$53,280.87 shown there for labor is not a true item of the amount that Schaefer paid, correct?

A. It is a true cost on the job, of expense incurred.

Q. Including therein the amount collected for payment to the United States?

A. That's right.

Q. And you can't give me that figure?

A. No.

Q. And you didn't compute that figure? [1443]

A. No, I did not.

Q. You knew of this, did you not, sir?

A. Yes. I don't see where it is material.

Q. Well, please, that's what we have a court for, to rule on that. I think that's all, Mr. Hendershott.

Mr. Hawkins: We have no questions, your Honor.

The Court: Mr. Ivy?

Mr. Ivy: No questions.

The Court: Anything further?

Mr. Olson: No, except that I do want those totals of those miscellaneous items.

(Whereupon, there being no further questions, the witness was excused.)

M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Olson:

Q. You are Mr. M. C. Schaefer? A. Yes.

Q. And have previously testified at the commencement of this trial? A. I did.

Q. Now, Mr. Schaefer, when Mr. Larry Bufton was on the stand he was asked about his trip out there, field trip out inspecting these jobs. Did you accompany him out to 1062 and 1068?

A. I did.

Q. And state whether or not you showed him correctly the locations of 1062 and the location of 1068?

Mr. Holman: Just a minute. I object to that question, your Honor. The purpose of this testimony now is to bolster up the testimony of a prior witness who has already indicated what information he got and how he got it, and it can only be re-iteration for that purpose.

The Court: The purpose of it, as I understand, is to show that he examined the right structures on the [1444] ground, and the only way that can be shown is by Mr. Schaefer's testimony as to what he showed him, isn't that the purpose?

Mr. Olson: That's exactly the purpose of it.

The Court: Objection overruled.

Witness: Yes, we did.

(Testimony of M. C. Schaefer.)

Q. Now, you have in mind, do you, the two sub-contracts that have been introduced into evidence here, without my showing them to you?

A. Yes.

Q. Will you state whether or not you prepared or had prepared either of those sub-contracts?

A. I did not.

Q. Will you state whether or not the contracts were prepared previously to being submitted to you by Mr. Macri?

Mr. Holman: Just a minute; your Honor, this is quite a vital matter from a legal viewpoint, and I object to counsel's leading questions.

Mr. Olson: Your Honor, I asked him to state "whether or not." I can't see how that suggests one way any more than the other.

The Court: Well, a "whether or not" question can be leading. I'll overrule the objection in this case.

Witness: They were prepared by Macri's office or by Mr. Macri. I had nothing to do with the preparation of [1445] them. On 1062 I signed that contract at Mr. Macri's residence. 1068 I signed that contract at the job office, I believe it is the University Homes job; I had nothing to do with the preparation of it.

Mr. Holmes: Stadium Homes?

A. Stadium Homes, yes.

Q. Now, with reference to Mr. William Schaefer, your brother, appearing on the payroll at a salary, I believe he said, of \$100.00 a week, would

(Testimony of M. C. Schaefer.)

you state when your brother was shown on the payroll of this job 1062? I'm not asking for the time, but under what circumstances would he be shown on the payroll of 1062?

A. That was when he was steadily on that job, and beyond the reasonable time that a general superintendent would be on a job for his regular duty.

Q. Now, there's also been statements made as to the number of men on this job never having exceeded 12. Would you state what is the situation with reference to the number of men which were employed on this job?

Mr. Hawkins: Your Honor, I object to that. That's a broad question. He should state at what time or times. Obviously it would vary from day to day.

Mr. Olson: Your Honor, counsel's made the statement there never was more than 12.

The Court: Read the question. [1446]

(Whereupon, the reporter read the last previous question.)

The Court: With reference, I assume, to the maximum number over 12.

Mr. Holman: I would like to make this objection, your Honor, that counsel is calling for oral testimony from this witness, which is not the best evidence before this Court. Identification 16, the Schaefer payroll, is here, and it is under the certification of this gentleman, and so far as the government is concerned and the principal contractor is

(Testimony of M. C. Schaefer.)

concerned, it is a declaration accepted in a document by this sub-contractor that can't be changed. In other words, it is an attempt to substitute oral testimony for a written document under their own certification.

The Court: Well, I'll overrule the objection.

Q. Would you answer the question?

A. There have been as many as 30 men on the job at one time. There have been times there, 25, 28; the greatest number of men I am quite sure was 30.

Q. Are you able to indicate any average in that regard, Mr. Schaefer, or would it be a matter of speculation?

A. That would be more a matter of speculation.

Mr. Hawkins: Your Honor, I—well, I guess the witness is unable to answer that. [1447]

The Court: Yes, I'll sustain the objection to that.

Q. Now, were you able, Mr. Schaefer, to have available and on this job sufficient manpower as was required by the operations that were available to you? A. Yes.

Mr. Holman: Just a minute. Your Honor, I object to that as immaterial. The question wasn't whether he was able; whether he did. If counsel is referring to the term in the sub-contract that provides that in the event of some act beyond the control of the sub-contractor he is prevented from doing his work, then the sub-contract itself provides what he shall do, and the first thing is give notice,

(Testimony of M. C. Schaefer.)

and until he shows that he gave notice and got an extension of time, it is immaterial.

The Court: Overrule the objection.

Witness: We had enough men on that job for the rate of progress that we were able to make. If we had been required to double the crew we had men in Portland that I could have shoved up on this job to double the crew.

Mr. Holman: I move that the answer be stricken as not responsive to the question, your Honor.

The Court: Denied.

Q. Now, Mr. Schaefer, you've been here and heard Mr. Hendershott, the accountant, testify?

A. Yes. [1448]

Q. Did Mr. Hendershott make an examination of your records at your request? A. He did.

Q. And state what records you made available for him in connection with his examination of your accounts on 1062?

A. I made available to Mr. Hendershott all of the books and records of Concrete Construction Company. I told the bookkeeper to supply Mr. Hendershott with any information he wanted or with any books or records.

Q. And were those books and records which were submitted to Mr. Hendershott the original records of your office in regard thereto?

A. Yes.

Q. Were there any invoices submitted to him?

A. They were.

Q. And were the invoices submitted to him,

(Testimony of M. C. Schaefer.)

did they cover items that actually went into this job? A. They did.

Q. Now, Mr. Schaefer, handing you plaintiff's Exhibit 63, and taking the first item there of labor, which totals, according to the exhibit, \$53,280.87, I will ask you if that is the reasonable, if that is the actual cost and the reasonable value of the labor that actually went into the performance of 1062?

Mr. Holman: Just a minute. May it please the [1449] Court, I object to that question on the ground and for the reason that identification 16 is a certified payroll of the labor cost which this gentleman certified had been incurred on this job, and Mr. Hendershott, may it please the Court, has testified that that item is a transfer from that certified payroll, and therefore it becomes immaterial whether or not in the opinion of this witness it is reasonable or unreasonable. It is a fixed figure, according to Mr. Hendershott, and the reasonableness or the unreasonableness in the mind of this witness has nothing to do with it.

The Court: Well, I judge from the cross-examination there is some controversy as to whether it included items that didn't represent actual labor cost to Mr. Schaefer. I'll overrule the objection.

Witness: It is.

Q. And did that labor, and all of it, actually go into this job? A. It did.

Mr. Holman: Same objection, your Honor.

The Court: Overruled.

Q. Now, on the next item of payroll insurance,

(Testimony of M. C. Schaefer.)

figured at .024 cents per hour, in the total amount of \$831.64, I will ask you if that item was actually required to be paid to the State of Washington, Industrial Insurance [1450] Division, on your payroll? A. It is.

Q. And your next item of payroll taxes, 4 per cent, \$2131.21, I'll ask you if that is the actual cost and the actual amount of the Social Security, the Unemployment Insurance, and the Federal Excise Tax on this job? A. It is.

Q. And taking your next item of truck hire, in the amount of \$2919.96, I will ask you if that is the actual cost and reasonable value of money paid out by you for hiring a truck in the performance of 1062?

Mr. Holman: Just a minute. I would like to make the objection once so that my position is clear, and not re-iterate it. In this instance again, may it please the Court, Mr. Hendershott has testified that he had before him the statements of the various creditors, and these are the entries of those items, including this truck hire item. Now then, it becomes wholly immaterial as to whether they are reasonable or unreasonable in the mind of this witness, who is a party to this litigation, since he has submitted and your Honor has admitted the compilation made by the accountant, and nothing that this witness can say can add to or detract from the certification of Mr. Hendershott with respect to that exhibit, may it please the Court, therefore I submit it is immaterial and [1451] outside of the issue, and should not be received by the Court.

(Testimony of M. C. Schaefer.)

The Court: Well, I think under plaintiff's theory it is material to show the reasonable value of the labor and materials furnished on this job.

Mr. Holman: That is under the second cause of action, your Honor.

The Court: Well, I don't remember which cause of action it is.

Mr. Olson: It applies to both, your Honor, the first cause of action on the oral contract, and the other on the reasonable value because of their breach.

Mr. Holman: May it please the Court, if it is under the first cause of action, then I want to add to my objection that M. C. Schaefer as sub-contractor has furnished to the government, and it is here available as identification 16, the certified payroll of M. C. Schaefer including all items of labor, and there is also here his books and records with respect to these items that he's now testifying about, and that the items themselves would be the best evidence, and not this witness's testimony.

The Court: Overruled.

Mr. Holman: That may carry through?

The Court: Yes, the record may show that the same objection is made as to each item. [1452]

Mr. Olson: Will you read the question, please?

(Whereupon, the reporter read the last previous question.)

Witness: It is.

(Testimony of M. C. Schaefer.)

Q. Now, the next item of equipment rental, \$14.00, I will ask you if that item is the actual amount paid, the actual cost and the reasonable value of the rental of equipment used in the performance of job 1062? A. It is.

Q. Now, taking your next item of small tools of \$196.31, I'll ask you if that is the actual cost and reasonable value of the small tools used in connection with the performance of 1062? A. It is.

Q. And your next item of equipment repairs and maintenance in the amount of \$1761.78, I'll ask you if that is the actual cost and the reasonable value of the equipment repairs and maintenance in connection with the performance of 1062?

A. It is.

Q. And your next item of gasoline in the amount of \$1990.69, state whether or not that is the reasonable value and the actual cost of gasoline purchased and used in connection with the performance of 1062? A. It is. [1453]

Q. And your next item of oil in the amount of \$83.98, I will ask you if that's the actual cost and reasonable value of oil purchased and used in connection with the performance of 1062?

A. It is.

Q. Now, your next item is form oil, Mr. Schaefer. State what that consists of.

A. Well, that's oil that's applied to the forms to help in preventing the moisture leaving the concrete during the pouring, that is, soaking into the lumber and out into the air. It is to help cure the concrete,

(Testimony of M. C. Schaefer.)

and as a protection to the form, and helping to make it easier in stripping.

Q. Now, the item shown for form oil of \$99.92, state whether or not that is the actual cost and the reasonable value of form oil used in connection with the performance of 1062? A. It is.

Q. And your next item of hardware in the amount of \$405.18, state whether or not that is the actual cost and the reasonable value of hardware used in connection with the performance of 1062?

A. It is.

Q. And your next item of metal pipe plugs, there was some question about that yesterday. Would you state what they [1454] are?

A. A metal pipe plug is a plug that we designed to take the place of wood plugs that were ordinarily used, or were used by previous contractors on that work. It is a much easier method of putting in the first tile into the structure, which was not a part of our work, but when it became necessary for us, in order to get on with our job, to put in the first pipe into the structure, brother Bill, after seeing the first few wood plugs, said "Well, now, that's enough of that"——

Mr. Holman: Just a minute. I submit that the conversation shouldn't be included. I also submit that that portion of the answer which says what is not his work should be stricken as a conclusion of the witness. The contract should determine.

The Court: I think those portions should be

(Testimony of M. C. Schaefer.)

stricken, what his brother said and his conclusions as to what part of the work was.

(Whereupon, metal pipe plug was marked Plaintiff's Exhibit No. 70 for identification.)

Q. Mr. Schaefer, handing you plaintiff's identification 70, I'll ask you to state what that is.

A. That is a pipe plug. It was required——

Q. Just a minute, Mr. Schaefer. There's no question to you right now. Were there more than one of these used on the [1455] job? A. Yes.

Q. And is this one of the pipe plugs?

A. That's right.

Q. That was used, and which is covered by the item on this exhibit? A. It is.

Mr. Olson: We offer plaintiff's identification 70 in evidence.

Mr. Holman: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 70 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. The exhibit 63 shows metal pipe plugs of \$83.50. I will ask you to state whether or not that is the actual cost and the reasonable value of metal pipe plugs that were used in connection with the performance of 1062? A. It is.

(Testimony of M. C. Schaefer.)

Q. And the Hunt Process and Sealcure, the next item on the exhibit, would you state what that is?

A. That is a material that's spread on to the concrete to help retard the rapid leaving of moisture, or the leaving of the moisture out of the concrete prematurely. It helps to protect against the sun and as against freezing. [1456]

Q. On the exhibit, then, Hunt Process and Sealcure, in the amount of \$431.80, I will ask you if that is the actual cost and reasonable value of the Hunt Process and Sealcure which was used in connection with the performance of 1062? A. It is.

Q. How do you pronounce that next?

A. That's Sisalkraft paper.

Q. Would you explain what Sisalkraft paper is, then?

A. Well, Sisalkraft paper is also the protection against the sun or the rapid drying out of the concrete, and also as a protection against freezing. It is placed over the concrete structure.

Q. Then that item of Sisalkraft paper in the amount of \$69.60 appearing on the exhibit, I'll ask you if that amount was the actual cost and the reasonable value of the Sisalkraft paper used in connection with the performance of 1062?

A. It is.

Q. And your next item is batching? Explain what that is.

A. Well, the batching is the work that we had done by Sather & Sons. They hauled the aggregate from the aggregate piles up a ramp, dumped it into

(Testimony of M. C. Schaefer.)

the batching plant, and we batched the aggregates into our aggregate trucks, and Sather's batching was \$1.00 per yard batch of concrete; the price of Collucio at the end of——

Mr. Holman: Just a minute. I object to that, [1457] your Honor. We're going into other jobs now to bolster up his opinion as to reasonable value.

The Court: Collucio was on some other job?

Witness: No, Collucio took over this same plant, before we were through with our operations.

The Court: You're still talking about 1062?

A. That is correct.

Mr. Holman: He's talking about 1062, your Honor, but he's talking about 1062, schedule 2.

A. No, I'm talking about 1062.

Mr. Holman: Schedule 2?

A. Schedule 1.

The Court: Well, continue with your answer, then, explaining this batching item.

A. In other words, at the time we took this job it was expected that we were going to be off, or away from both jobs, by September 15. We talked to Mr. Davis of Sather & Sons about the price of batching, and he quoted us a dollar.

Mr. Holman: Just a minute. I submit that the conversations with others are not competent here.

The Court: Well, I think he can show what arrangements he made, and what price was charged, as an explanation of the item. Not the details of the conversation, though. Proceed. [1458]

A. Well, the price held firm at a dollar per batch

(Testimony of M. C. Schaefer.)

until September 15, or as long as Sather & Company were still making out of this batching plant for their own work. When they completed their work they sold the batching plant, so I understand, to Collucio.

Mr. Holman: I submit this is too historical and not enough responsive to the question.

The Court: He's asking him to explain this item of batching, what it was, and I suppose that bears on the question of whether or not it was reasonable.

A. Collucio's charge, then, for the balance of the job was \$2.50 per cubic yard of concrete batch.

Q. Now, I'll ask you, then, Mr. Schaefer, if this item of \$2780.62 for batching is the actual cost and the reasonable value of the batching services that went into this job, and used in connection with the performance of 1062? A. It is.

Q. Now, the next item is lumber for a cement shed in the amount of \$2.60. Would you explain that item?

A. I believe that is lath used in holding down the paper about the building. The lumber for the cement shed was brought up from Portland, and it was second hand lumber. The joists of it had been used on airport work, for streets.

Q. Is that other lumber charged in here any place on this job? [1459]

A. It is not.

Q. It is not?

A. It is not.

(Testimony of M. C. Schaefer.)

Q. Well, this \$2.60, then, represents only a part of the cost of the cement shed?

A. That's right.

Q. Well, state whether or not the item of \$2.60 would be the actual cost and the reasonable value of that lath or material that you purchased for the cement shed on this job? A. It is.

Q. And your next item is roofing for cement shed, in the amount of \$23.50. I'll ask you if that is the actual cost and the reasonable value of the roofing that went into the cement shed for use in the performance of 1062? A. It is.

Q. Now, when this job was over what happened to the cement shed?

A. The cement shed stayed on the property. That was the agreement, as I understood, that any shed that we might build would have to remain on the property?

Mr. Holman: I move that be stricken, your Honor.

The Court: Well, all of it except that it would remain there. That will stand.

Q. Now, your next item of travel expense in the amount of [1460] \$67.57, I will ask you whether or not that is the actual cost and the reasonable value of travel expense actually incurred and required in connection with the performance of 1062?

A. It is.

Q. Now, your next item of miscellaneous expense, I will ask you if that sum of \$144.21 is the actual cost and the reasonable value of the miscel-

(Testimony of M. C. Schaefer.)

laneous items as related from the stand by Mr. Hendershott, that went into the actual performance of 1062? A. It is.

Q. And the next item of bond, \$393.90, I'll ask you if that is the actual cost and the reasonable value and is the premium charged in connection with the performance bond you gave under your 1062 sub-contract? A. It is.

Q. The next item of engineering expense of \$201.25, would you explain what that was?

A. That was for Mr. C. E. Hewitt's service in making his computations of excavations on 1062.

Q. Is that with reference to the exhibit which has been introduced into evidence?

A. That is correct.

Q. And is that item the actual amount charged and paid by you to Mr. Hewitt? [1461]

A. It is.

Q. Now, your next item of legal expense in the amount of \$533.57, state what that is.

A. That is McKelvey, a bill for legal expense.

(Whereupon, Statement for legal services, McKelvey, was marked Plaintiff's Exhibit No. 71 for identification.)

Q. Handing you plaintiff's identification 71, would you state what that is, please?

A. That is McKelvey's statement for legal services, in connection with 1062.

Q. In connection with 1062?

A. That's right.

Mr. Olson: We offer plaintiff's identification 71 in evidence.

(Testimony of M. C. Schaefer.)

Mr. Holman: I object to it, your Honor, as having no probative force in this action under the issues as framed, also for the reason that it is not itemized sufficiently to advise the other parties litigant as to the contents or the time, the period during which the services were rendered, and also that it is a self-serving document submitted to the party by his own attorney.

The Court: Objection overruled. It will be admitted. [1462]

(Whereupon, Plaintiff's Exhibit No. 71 for identification was admitted in evidence.)

Q. During what period of time were these services rendered, Mr. Schaefer?

Mr. Holman: Now, may it please the Court, I object to any inquiry on that, because if they introduce the document as the proof, then certainly the deficiencies of the document can't be supplied by oral testimony other than by the one who prepared it.

The Court: I'll retract my admission of the exhibit; overrule the objection. You may show when it was, if you wish.

Q. Mr. Schaefer, did you personally secure the services of Mr. McKelvey? A. I did.

Q. And do you know approximately when you secured his services?

A. I believe it was in October of '44.

Q. Then are you able to state, Mr. Schaefer, approximately when the services covered by that state-

(Testimony of M. C. Schaefer.)

ment, being plaintiff's identification 71, were rendered by Mr. McKelvey and his office?

A. Well, from the time I employed him to the completion of his part of the work, and that was in October of '45.

Q. You say you first went to him in about October, 1944? A. I believe that is correct.

Mr. Olson: We again offer, then, in evidence, plaintiff's identification 71.

Mr. Holman: May I ask a question of the witness?

The Court: Yes.

Voir Dire Examination

By Mr. Holman:

Q. Was Mr. McKelvey's services, were they obtained before or after you had made application for arbitration under the sub-contract?

A. They were before.

Q. Before; then you made application for arbitration under the sub-contract under the advice of Mr. McKelvey? A. That's right.

Q. And did Mr. McKelvey give you any advice with reference to the type and the manner of performance of the job, after October, 1944?

A. He did not.

Mr. Holman: Then I raise the same objection I did before, your Honor, that it is not a job cost, but is litigation cost, and therefore is not a proper item in this compilation of Mr. Hendershott.

The Court: I'll overrule the objection. I might say that the admission, or ruling of the Court ad-

(Testimony of M. C. Schaefer.)

mitting the evidence, these documents relating to the items here, is not a ruling that they are costs properly chargeable [1464] against this job. They are admitted in evidence, and the effect of them will be passed on later.

Mr. Holman: I understand.

(Whereupon, Plaintiff's Exhibit No. 71 for identification was admitted in evidence.)

The Court: We'll take a recess for ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Direct Examination
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, the next item on your exhibit 63 is overhead expense, 20 per cent of the total of the direct costs, being the total of the items immediately preceding the item of overhead expense, totalling in the overhead expense charged to this job \$13,582.82, being the items as enumerated by Mr. Hendershott. I'll ask you whether or not that is the reasonable value of the items of overhead expense chargeable to the performance of 1062?

Mr. Holman: To that question I object, your Honor, for the reason that the witness has already adopted the opinion of the compiler of the statement as a fixed item, and therefore it is not one subject to determination as to reasonableness. If your Honor will recall, Mr. Hendershott's testimony

(Testimony of M. C. Schaefer.)

was that he regarded that as a fair basis of charge.

The Court: Yes, I remember his testimony. However, it is based upon an allocation, or supposed to be, I think, although an arbitrary one, in some respects, of the costs of the main office.

Mr. Holman: That is my sole point, your Honor.

The Court: I'll overrule the objection. He may answer for what it is worth.

Witness: It is: I'd say if anything it is a bit low.

Q. Now, the item of profit, 10 per cent, \$8203.05, what is that item, Mr. Schaefer?

A. That is for my services.

Mr. Hawkins: Your Honor, I object to that question. I think that is wholly immaterial. In any event, I know of no agreement of any kind whereby Mr. Macri promised to pay 10 per cent, either the written sub-contract or this so-called oral agreement.

The Court: Well, this question, I think, was—what was that you're asking, what it was? I'll overrule the objection. Had you answered the question? A. Yes.

Mr. Olson: He said it was for his services.

The Court: Yes.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, I'll ask you, Mr. Schaefer, whether or not that amount, \$8203.05, together with any amount

(Testimony of M. C. Schaefer.)

that may be [1466] included in the previous 20 per cent overhead expense for your services, is the reasonable value of your services in connection with the performance of 1062?

Mr. Holman: Objected as calling for a self-serving statement, your Honor, asking the man to give his opinion as to the value of his own services.

The Court: Overruled.

A. It is.

Q. Now, I'll ask you the general question, then, Mr. Schaefer, as to whether or not the items shown on plaintiff's Exhibit 63 were reasonably required in the actual performance of 1062?

A. They were.

Q. Now, Mr. Schaefer, when did you first start out in the contracting business?

A. Well, I started doing——

Q. Construction work?

A. ——I started doing carpenter work on April 13, 1922, I think it was on a Thursday, at 7:30 in the morning.

Q. And how long did you work in the—you stated you started out as a carpenter?

A. That's right.

Q. How old were you then? A. 15.

Q. And go ahead and relate just what your experience has [1467] been in the construction and contracting business.

A. Well, I started out working for an uncle, and then my father went back into the construction game, and I worked with my father. Then in April,

(Testimony of M. C. Schaefer.)

1924, I worked as a stair builder in Chicago, first building about five stairs, and after that I was lay-out man for the field or for the job operations; there was 15 stair works. That job lasted until December of '24. Through '24 and '25 I worked as carpenter and carpenter foreman, doing some of the estimating for my father's construction company. It was A.M. Schaefer and Sons at that time. In 1926, 1927, 1928, 1929 and 1930 I did all of the estimating and purchasing of materials, the handling of sub-contracts, and getting of the material and sub-contractors and men to the different jobs. In 1930 through 1936, those were depression years, and I did quite a bit of H.O.L.C. repair work. There's some work of remodeling for Lakeview Cartage Company and for Curtis Candy Company. At that time I also went to Chicago Technical College and took a course of estimating. From November of 1936 to June of 1938 I did estimating for Zuker Concrete Construction Company in Portland.

Q. For who?

A. Zuker Concrete Construction Company. From June '38 to February '40 I did estimating as a profession. From 1940 [1468] to date I operated my own business, which is Concrete Construction Company, in Portland.

Q. You say in 1938 to 1940 you did estimating as a profession?

A. That's correct.

Q. Just what was the nature of that?

A. Well, I did estimating for a number of general contractors. I prepared their bids, took off

(Testimony of M. C. Schaefer.)

the materials, priced the work, made up the bid forms, all on a percentage basis, percentage of profit basis.

Q. Now, did that work include concrete work?

A. It included concrete work and general building construction.

Q. Now, you say since 1940 up to date you've had your own business? A. That's correct.

Q. And that business has been what?

A. That business has been concrete and general construction. My experience in construction has been the building of churches, schools, residences, stores and apartments, small bridges, small dams, culverts and head walls, dairy plants, airport warming aprons and tie-down slips, manholes, catch basins, inlets, gas regulator vaults, electric regulator vaults, garages, public and private——

Mr. Holman: What are you reading from?

A. This is a memo I made up. [1469]

Mr. Holman: Prepared when, for the purpose of testifying?

A. Just so as to give a list of my experiences.

Q. Go ahead.

A. Electric regulator vaults—well, I read that; service stations, a bus depot, we did work for a number of chemical plants, there's curbs and gutters, sidewalks and retaining walls, concrete posts, banks, foundry, ship ballasts, floors and scullers of ships. We did on the main Walla Walla Farm Labor Camp we did all the Concrete work, that was in 1940, I believe, which included silo——

The Court: What was that last word?

(Testimony of M. C. Schaefer.)

A. Silo, and a sewage plant. We did concrete work at Pendleton and Hermiston. There was reservoirs and target butts at Camp Adair, fire walls for the oil companies, swimming pools, laminated wood sawdust bins, pump house at Sauvi's Island, and there is just a variety of other work.

Q. Now Mr. Schaefer, getting down to concrete structures to be installed on 1062, I'll ask you what is the—what lateral clearance would be reasonably required in excavations in order to enable a reasonably skillful and able contractor to assemble and install forms and panels?

Mr. Holman: Just a minute, your Honor, Objected to as having been already covered by this witness. He's [1470] given his opinion before.

Mr. Olson: I don't think I asked him.

Mr. Holman: Oh, I'm positive he's testified as to the distance out, and as to the slope, and everything else.

The Court: He testified what they were, but I don't believe he's expressed an opinion as an expert as to what is reasonably necessary. I'll overrule the objection.

A. The proper——

Mr. Olson: Wait a minute; I'm only about half through.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: I want to object to the question further, your Honor, that in his question itself he's

(Testimony of M. C. Schaefer.)

asking Mr. Schaefer to confirm himself as a reasonable and experienced contractor.

The Court: Well, he isn't testifying about himself. He's testifying as to a hypothetical contractor. Let's have the question completely asked, then make your objection, and I'll rule on it. You hadn't finished asking your question yet, had you?

Mr. Olson: No. It isn't a sentence yet, I don't think. I'm sorry, Mr. Taylor. [1471]

(Whereupon, the reporter again read the last previous question.)

Q. (By Mr. Olson): —in those excavations, and to remove the concrete panels and forms from the concrete structures after the concrete had been poured in the forms?

Mr. Holman: I object to the question, your Honor, first as calling for the opinion of this witness, who is a party litigant, propounded to him as a purported expert, asking for an answer to a hypothetical question without including all the elements of a hypothetical question that to date have been brought into issue by the testimony in the case, and specifically eliminating from the question the specifications of the Bureau of Reclamation involved and brought into this case, and further, for the reason that while it purports to be a question propounded to an expert, it is actually and for all practical purposes a self-serving statement by this witness, a party litigant, with respect to the performance of his own job, no matter how it is couched, therefore it is an improper question.

(Testimony of M. C. Schaefer.)

The Court: Is it your position that a litigant may not testify as an expert, even though he's qualified?

Mr. Holman: He may, your Honor, but you can't have a personal basis directly tied to an issue before the Court. It is my position, your Honor, that an expert [1472] witness can give his evidence for the guidance of the Court, but an expert cannot give his opinion upon a finding of an issue that is for the Court to determine, and that is what this question purports to find from this witness. It purports to ask Mr. Schaefer "What did you need to do this job?".

The Court: Well, he's asking what a hypothetical contractor would require.

Mr. Holman: It is couched that way, your Honor, but it is very slightly veiled.

The Court: Objection overruled.

Q. I would like to include in my question, in answering that hypothetical question just asked you, Mr. Schaefer, I am referring to the concrete structures as shown on the structure lay-out plan, being plaintiff's exhibit 12.

The Court: I'm not sure that I gave you a chance to object, Mr. Hawkins. It is understood, of course, that the others join.

Mr. Hawkins: Yes; I have no further reasons to point out.

Witness: If it is to be a lateral clearance without slope, the lateral clearance should be not less than three feet.

(Testimony of M. C. Schaefer.)

Mr. Holman: I move that the answer be stricken as not responsive, your Honor. [1473]

The Court: Overruled; denied, I mean.

Q. Now, assuming the same set of facts, Mr. Schaefer, and assuming that the banks opposite that portion of the concrete structure requiring an intervening form are sloped, what slope and what lateral clearance could be reasonably required for the same purposes, in that case?

Mr. Holman: Same objection.

The Court: Overruled.

A. One foot out at the base of the structure, and on a 1 to 1 slope.

Q. Now, referring to the sub-contract covering 1062, having in mind the specifications covering 1062, being plaintiff's exhibit 3, and the structure lay-out plan, being plaintiff's exhibit 12, and assuming that you have excavations furnished and provided which had a lateral clearance in cases where the bank was—a lateral clearance of three feet in cases where the banks were vertical at all points where intervening form was required between the bank and the concrete structure to be installed, or assuming that you had a lateral clearance of one foot at the foundation of the structure outside of the neat line of the concrete, with a slope of the bank of 1 to 1 from the foundation of the excavation to the surface of the ground at all points where an intervening form was required to be inserted between the concrete and the [1474] bank, and assuming further that the floors of the excavations

(Testimony of M. C. Schaefer.)

were hand graded so as to be to the proper grade, sub-grades and elevations, and of the proper form to receive concrete in accordance with the structure lay-out plans and specifications, and assuming further, Mr. Schaefer, that the excavations were provided timely, so that you could proceed, or so that the contractor could proceed with the installation of the forms and the pouring of concrete without delay, and assuming further that the form lumber being furnished by someone else was furnished timely and of a quality suitable for use in the performance of, or in the building of the panels and forms for this structure, for these type of structures, and assuming that the sub-contractor was required to furnish the labor and necessary equipment to do all of the concrete work, form work, to cut, bend and install all re-inforcing steel, all such work to be as shown on the specifications 1062, and that the sub-contractor was required to scrape and clean the concrete forms, remove the nails from same, and pile the same in neat piles after the concrete has been poured, the forms upon completion of the job to be the property of the general contractor, and assuming that the sub-contractor was required to furnish the wire, the nails, and the curing materials, and none of the other materials, what in your [1475] opinion, Mr. Schaefer, would be the reasonable cost and value of the performance of that work by a reasonable, able and skillful contractor, as called for in those specifications and the structure lay-out plan?

(Testimony of M. C. Schaefer.)

A. That would be \$26.00 a cubic yard of concrete.

Q. Did you make a detailed estimate, Mr. Schaefer, before you executed plaintiff's exhibit 5?

A. I did.

Q. Do you have that with you?

A. I have.

Q. Assuming that the same contractor was to— by the same contractor I mean a reasonable, able and competent sub-contractor, in addition to pouring the concrete under those circumstances, was to furnish the form lumber, what would be the reasonable value of that additional service, of furnishing the form lumber?

Mr. Hawkins: I don't see the materiality of that, and I object to it.

Mr. Holman: I join, your Honor.

The Court: Isn't that bringing in a condition that doesn't exist here?

Mr. Olson: It does, your Honor, and I'll state my position on it. Your Honor will recall that on this other contract that was practically all fours with this one, testified by Mr. Bufton, apparently the price was [1476] \$30.00 a cubic yard, and the only difference between that job and this job was apparently in that job the sub-contractor was furnishing the form lumber. That's the purpose of this question.

The Court: I'll overrule the objection and let it in for that purpose only.

Witness: That would run about \$4.00 a cubic yard.

(Testimony of M. C. Schaefer.)

Q. Did you have some discussion with Mr. Macri about whether you would furnish the form lumber or not? A. I did.

Q. And was that figure of \$4.00 per yard discussed with Mr. Macri?

A. I did—that was discussed with him.

Q. Now, Mr. Schaefer, with reference to specifications 1068, and your sub-contract, being plaintiff's exhibit 6, you went over the plans and specifications covering 1068, did you not? A. I did.

Q. Being plaintiff's exhibit 4, and the structure lay-out plan covering 1068, being plaintiff's exhibit 13——

Clerk: No structure lay-out plan on 1068 in evidence, unless it is included in this one.

Q. Did you go over the structure lay-out plans covering 1068 too, Mr. Schaefer? A. I did.

Q. And then also having in mind your plaintiff's Exhibit 6, being the sub-contract, under which contract you were to furnish all labor and necessary equipment to do all the concrete work, form work, structural timber work, cut, bend and install all reinforcing steel, all such work to be as shown on the plans and as specified in specifications 1068, Roza Division, and were to clean all concrete forms, to remove the nails from the same, to pile the same in neat piles, forms and form lumber at the completion of the job to remain the property of the general contractor, the work to be done in strict accordance with the plans and specifications and under government inspection to the satisfaction of

(Testimony of M. C. Schaefer.)

the general contractor, and that all materials except the form wire, nails, and curing materials were to be furnished by the general contractor, and the sub-contractor, being yourself, to furnish the wire, nails, and curing material, and the general contractor to furnish the form lumber, and assuming that you were to receive a compensation of \$35.00 per thousand board feet of structural timber placed, \$28.00 per cubic yard for concrete installed, 2 cents a pound for re-inforcing steel in place, gates and miscellaneous iron work at 3 cents a pound in place, and assuming that the excavations on 1068 into which the structures referred to in the specifications and structure lay-out plans were to be placed were [1478] excavated as you have stated would be reasonably required namely, to a three feet lateral dimension clearance if the walls were vertical, or to a lateral dimension of one foot outside of the neat line of the concrete at the foundation of the structure and with the banks from the foot of the structure or the foundation of the structure at a 1 to 1 slope at all points where intervening concrete form had to be installed between the concrete and the bank, and assuming further that the excavations were furnished and provided sufficiently in advance of your work so that you could install the panels and forms and pour the concrete without being delayed, and assuming further that the floor or foundation of the excavations were so excavated as to be ready to receive concrete in accordance with the specifications and structure lay-out plans,

(Testimony of M. C. Schaefer.)

with proper sub-grades and elevations provided, and assuming further that the lumber to be furnished by the prime contractor as read from the sub-contract was furnished timely and as needed, and without delay, and of the quality suitable for those operations, I'll ask you then, Mr. Schaefer, what profit would you reasonably have received or would you have received, or by what amount, if any, would the price called for in the sub-contract, as I read, exceed your cost, your reasonable cost, in the performance of 1068? [1479]

Mr. Holman: Your Honor, I would like to interpose the same objections as were previously interposed as to 1062 answers by this gentleman upon the hypothetical question, plus the additional objection that in the case of 1068 the record affirmatively shows that this gentleman in his operations was de-barred by notice from proceeding with the work, and therefore this interrogation is immaterial and irrelevant, and outside of the issues with respect to the performance features of that job, and the direct proof, and the only true proof, could be the difference between the basis of his bid and the reasonable value for performance of the job, and the resulting profits therefrom. This question I submit is not within that scope.

Mr. Hawkins: Your Honor, I would like to add to the objection that any answer that this witness gives is purely speculative as to any profit that might ensue; there's been no testimony that this witness has ever showed a profit on a similar job.

(Testimony of M. C. Schaefer.)

Mr. Olson: Your Honor, as to Mr. Holman's objection, as I pointed out previously the evidence was that the defendants unlawfully took over the 1068 and started performing it themselves, without ever having given us an opportunity to perform 1068. The testimony shows that the first hand excavations wasn't had until February 5, [1480] 1945.

The Court: Well, I think that it is proper under the issues here to show loss of profit, but the thing that I am somewhat doubtful about, it seems to me, I may have been mistaken in following your long question here, it seemed to me that you had some elements mixed in there; didn't you base this on a reasonably competent and experienced sub-contractor? I thought you were starting out to ask what would be the difference between the bid price and the reasonable cost of performance here by a hypothetical sub-contractor, and ended up with what this sub-contractor, Mr. Schaefer, would have made.

Mr. Olson: Well, perhaps yes, maybe I did get it mixed up. I can clarify that, I think, your Honor, because I was intending to ask the difference between the bid price and what would have been received, the bid price and what was the cost of performance by a reasonable, competent sub-contractor.

The Court: Under the conditions that you stated?

Mr. Olson: Yes.

The Court: But toward the last of the question you injected an element there of asking Mr. Schae-

(Testimony of M. C. Schaefer.)

fer what profit he would have made. I'd like to have it just understood which one you're asking here, and then we can decide whether or not it is proper. [1481]

Mr. Olson: I think that's true, your Honor.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, in answering the question, I wish you to exclude yourself as an individual on the thing, and answer the question as to the person performing the contract, what it was to the person performing the contract, being one who is a reasonably skilled, able, and competent sub-contractor.

The Court: It is understood that the objections still stand to the question, of course. Overruled.

A. Yes; oh, that party should have made \$8500.00.

Q. \$8500.00? A. Yes.

Mr. Holman: I take that to mean as a profit on this job.

The Court: Yes, I think that is sufficiently clear. What is the amount claimed here for loss of profit on 1068?

Mr. Olson: Your Honor, it isn't that much. It's \$5,000.00.

The Court: That's what I thought. I just wanted to be sure.

Mr. Olson: You may examine.

The Court: Well, I think it is a little late to start cross-examination now. [1482]

L. R. HENDERSHOTT

a witness called on behalf of the plaintiff, resumed the stand and testified further as follows:

Further Redirect Examination

By Mr. Olson:

Q. Mr Hendershott, with reference to the miscellaneous item on plaintiff's Exhibit 63, do you now have the breakdown on that item?

A. Yes; the telephone calls, \$61.12; pictures and films, \$16.30; first aid supplies, \$12.81——

Mr. Holman: Would you go a little slower? May I have that second figure, pictures and films?

A. \$16.30; first aid supplies, \$12.81; water from the city [1483] of Sunnyside, \$10.50; plan cover, 45 cents; snake bite remedies, \$4.38; bale of hay, \$2.40——

Q. Do you know what that bale of hay was used for? I don't suppose you do.

A. By hearsay only.

Q. All right, go ahead.

A. Sacks, \$3.32——

Mr. Holman: Sacks, did you say?

A. Sacks.

Mr. Holman: Cement?

A. No, those were the ones the finishers used, when they were finishing; post office box rental, \$1.80, postage, \$10.87; stationery, \$2.28; express charges, \$2.75; bridge tolls, \$4.15; and unidentified items of \$11.08.

(Testimony of L. R. Hendershott.)

Mr. Holman: Those bridge tolls are paying tolls, crossing a bridge? A. Yes.

Mr. Olson: That's all.

The Court: Do you wish to inquire into those items on cross-examination?

Mr. Holman: I do not, your Honor.

Mr. Hawkins: No examination.

(Whereupon, there being no further questions, the witness was excused.) [1484]

M. C. SCHAEFER

the plaintiff, resumed the witness stand.

Mr. Olson: Mr. Schaefer is on for cross-examination.

The Court: Yes, that's right. We're ready for cross-examination.

Cross-Examination

By Mr. Holman:

Q. Mr. Schaefer, the item of \$14.00 for towing the Mixomobile paid to Benton County, and shown by a photograph in 49, one of the sub-numbers, was it not? A. That's right.

Q. Referring specifically to sub-numbers of plaintiff's exhibit 49, picture 20 and picture 23?

A. That is correct.

Q. And that date of 3/10/45, March 10, 1945, marks the time that that towing was done?

A. That's right.

(Testimony of M. C. Schaefer.)

Q. Now, was that towing done at that time because the Mixomobile [1485] did not have the capacity to pull itself?

A. The road condition was such, yes.

Mr. Holman: I move that the answer be stricken, your Honor. I didn't ask him as to the road condition. It is not responsive.

The Court: I don't know whether it was responsive or not.

(Whereupon, the reporter read the last previous question and answer.)

The Court: Well, I take his answer to mean that it couldn't pull itself because of the road condition.

Witness: That's correct.

Mr. Holman: That's what he says, yes.

The Court: The motion to strike will be denied.

Cross-Examination

(Continued)

By Mr. Holman:

Q. In other words, the pictures 20 and 23 indicate a location of the Mixomobile in a spot where the Mixomobile could not propel itself upon the character of track there available on March 10, 1945, correct? A. That's correct.

Q. What was the capacity of the Benton County truck? A. I don't know.

Q. Oh, you were not there, sir? A. No.

Q. All right, sir. Your accountant, Mr. Hender-shott, indicated [1486] the small tools as expendable, is that correct? A. That is correct.

(Testimony of M. C. Schaefer.)

Q. The form oil is put on with respect to the time the panel is completed?

A. After the panels are built the forms are oiled.

Q. Then? A. That's right.

Q. As part of the same general construction operation?

A. Well, the first time they were oiled in the yard.

Q. Yes. A. That's right.

Q. Now, if the panels had immediately been placed in structure and concrete had been immediately poured, the one oiling would be sufficient, would it not? A. Not for the job, no.

Q. Sir? A. Not for the job.

Q. It requires two oilings, sir, or how many oilings?

A. It would require, depending on often those particular forms were used.

Q. Well, assuming that a new form had been built in the yard, and had been oiled with form oil, and had been set in a structure currently, without delay, and the concrete had been poured currently, without delay, would it be necessary to re-oil the form? [1487]

A. Yes, that is, after that pour, before the second pour was made.

Q. Before the second pour of course you would have to remove the concrete, and then re-oil?

A. You would probably re-oil again then, and

(Testimony of M. C. Schaefer.)

the form then would probably be good for three or four more uses before being oiled again.

Q. You would, however, have to remove the concrete, that's true?

A. Well, that would be a very minor operation.

Q. Well, regardless of how minor it is, you would have to remove any concrete that cohered, wouldn't you, I mean adhered?

A. That's right.

Q. With reference to plaintiff's Exhibit 70, \$83.50 for these plugs, the first charge upon your compilation—do you have a compilation there?

Mr. Hawkins: That's Exhibit 63, isn't it, Mr. Clerk?

The Clerk: That's right.

Q. —is for the month of September, 1944, is it not, under that item of hardware?

A. That's correct.

Q. And that would indicate, would it not, that during the month of September, or at least within that immediate [1488] vicinity, this work had been done, fixing these plugs? A. That's right.

Q. And that's work that Concrete Construction Company did themselves, isn't it?

A. We had these plugs built by a sheet metal man.

Q. Oh, I see, you had them built? A. Yes.

Q. Now, the spraying material you said was to prevent the evaporation and so forth?

A. That's right.

Q. Would that be required in the event that the operation contemplated a continuous one of building

(Testimony of M. C. Schaefer.)

the forms, setting them in the excavation, pouring the concrete, one, two, three, concurrently?

A. Yes, the Hunt Process or sealcure was required on all structures, no matter what the rate of pour was.

Q. In other words, it is a recognized ingredient, expendable ingredient, in the fixing of concrete structures? A. That's right.

Q. And regardless of how expeditious or how dilatory the progress is from the construction of the panels to the pouring of the concrete?

A. That's correct.

Q. The Sisalkraft paper was paper which you used, did you not, in the wintertime to prevent the freezing of concrete [1489] structures on account of the water content in the concrete?

A. Well, it was used for that, and——

Q. Isn't that correct, sir?

A. That's correct.

Q. And that was the first time you purchased that, did you not? When did you purchase the Sisalkraft paper?

A. The Sisalkraft paper was purchased in July, and it was also used for protection against the sun, the rapid evaporation of water out of the concrete.

Q. Then it also is a current, expendable item, necessary for the completion of the structure?

A. Correct.

Q. Regardless of the weather, sir?

A. Correct.

Q. Now, is it not a fact that you started your pouring on July 31, 1944, and that from the line-out

(Testimony of M. C. Schaefer.)

of the job at that time you knew that your pouring would go through the winter?

A. That isn't necessarily true, no.

Q. Not necessarily true; all right, sir; and the Sisalkraft paper was not bought as a precaution for the time that you knew you would encounter freezing weather?

A. No, it was purchased at the time for sun protection.

Q. Is it put on the form, or is it put on the concrete? [1490]

A. It is put over the concrete; that is, put over the form and the concrete.

Q. It is put over the form with the concrete in it? A. That's correct.

Q. And not put over a form to protect it from the sun? A. No.

Q. Could be used that way?

A. Well, it wouldn't be put over the form without having concrete in it, no.

Q. It wouldn't protect the lumber, but it is for concrete protection only, correct?

A. It is for concrete protection.

Q. And not for lumber?

A. It's never used that way, no.

Q. Now, with respect to this item, \$393.90 for bond, do you have a copy of the application you signed? A. I do not.

(Whereupon, blank form for bid bond was marked defendant Macri's Exhibit No. 72 for identification.)

(Testimony of M. C. Schaefer.)

Q. By the way, Mr. Schaefer, has Mr. Hunter in any manner communicated with you with respect to the application he was to send here?

A. He did not.

Mr. Olson: Your Honor please, I have a letter; I [1491] was going to bring it up at the end; I'll do it at this time if you wish. I have a letter from Mr. Allyn Hunter, which says "Dear Mr. Olson: In regard to sending the bond——"

Mr. Holman: Can we have this off the record?

The Court: Well, perhaps I had better see the letter, then. All right, will you pass this to Mr. Holman?

Mr. Olson: I take it the Mr. Holmes referred to there is Mr. Holman.

The Court: I think so.

Mr. Holman: I'd like to have this marked for identification, your Honor.

(Whereupon, letter Hunter to Olson, March 5, 1947, was marked Defendant Macri's Exhibit No. 73 for identification.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Handing you what has been marked Macri's identification 72, a blank form of application for contract and bid bond of the Glen Falls Indemnity Company, are you able, Mr. Schaefer, to tell me whether or not that is the type of application that

(Testimony of M. C. Schaefer.)

you signed, and directing your attention specifically to the portion in the back, where the undertaking——

Mr. Olson: That is objected to as being immaterial, where or not that's the type of application we [1492] signed, and on the further ground that it is wholly irrelevant to any matter that is in issue in this case.

The Court: Well, I'll permit him to answer it, and decide whether it is admissible or not after he answers.

Q. I haven't offered it yet, your Honor.

A. I wouldn't be able to swear to it. If this is the only form of application, why, then I imagine it's the one that I signed.

Q. But you go no further than to imagine?

A. Well, I couldn't say that that's the form, no.

Q. And with reference to that, I am directing your attention to the Macri Exhibit 34, the bond signed by the Glen Falls Indemnity and not signed by you, that's in evidence now; you recall that bond?

A. I do.

Mr. Holman: Your Honor, in furtherance of Macri's 73 for identification, I want the record to show that I am proposing to have a subpoena duces tecum served upon Allyn R. Hunter for production of that matter I have inquired about before. I don't think it is competent as an exhibit, but I'd like to have it kept in the record. Just one second, may it please the Court.

(Testimony of M. C. Schaefer.)

Cross-Examination
(Continued)

By Mr. Holman:

Q. You have no copy of the application you signed, Mr. Schaefer? [1493]

A. For bond? No, I don't.

Q. Handing you what has been marked Macri's identification 68, for a total of \$35,745.73 of claim by you, I'll ask you whether or not you transmitted that in due course of mail from your Concrete Construction Company office to Macri and Company at his Seattle office?

A. I wouldn't say as to whether I mailed it to Macri and Company, or whether I mailed it to McKelvey.

Q. But you did prepare and issue it with directions that it be delivered to Macri and Company either direct or through McKelvey; in other words, that was prepared for Macri and Company, was it not? A. Yes.

Q. Then, directing your attention to Macri Identification 69, bearing date of August 3, this particular copy as indicated having been mailed to our firm, for a broken down claim for a total of \$43,837.25, your answer would be the same as to that, would it not, that you transmitted that to Macri and Company? A. Yes.

Q. Now, is it or is it not a fact that you did not disclose to your accountant, Mr. Hendershott,

(Testimony of M. C. Schaefer.)

the gentleman who testified here, the contents of either Macri's 68 or Macri's 69?

A. I believe Mr. Hendershott has seen those copies. [1494]

Q. Before he made this compilation which is in evidence as 63?

A. I wouldn't be able to say on that.

Q. Well, can you tell me, sir, whether or not you made these available to Mr. Hendershott before he made the compilation which is in evidence as 63?

A. I wouldn't be able to say.

Q. I'll ask you if it is not a fact, sir, that you did tell Mr. Hendershott that you had billed twice, once for thirty-five thousand dollars, roughly, and the next time forty-three thousand dollars, roughly, and that for the purpose of suit you wanted it at the full amount that could be billed?

A. I did not. Them there were approximations for arbitration only.

Q. Now, did you or did you not furnish Mr. Hendershott, your accountant here, with the breakdown of allocation of labor as expended on the job, or did you merely furnish him the payroll which here is identification 16, the Schaefer payroll?

A. I never gave him the breakdown, the hour breakdown.

Q. All right, sir.

A. He didn't request it, or he would have had use of it.

Q. And with reference to Macri's exhibit for identification 67, notice of levy for ten thousand odd

(Testimony of M. C. Schaefer.)

dollars here, has [1495] that matter been satisfied with the government? A. No, it has not.

Q. All right, sir. In your answer to counsel on the hypothetical questions, where you fixed \$26.00 per cubic yard as a proper and correct unit price for performance of concrete structures, you recall that, do you? A. Yes.

Q. Did you or did you not assume a continuity of proper forms?

A. Yes, I figured on proper material being supplied, and that you would have proper forms, and proper conditions to work with.

Q. And you included in that as one of the component parts the construction of proper forms, correct? A. Correct.

Q. And you included in that, did you not, the exactness of fitting between the form and the fine grading, correct?

A. Will you give me that again, please?

Q. Read it, please.

(Whereupon, the reporter read the last previous question.)

A. It was based on the excavations being properly performed.

Q. Yes, sir; well, regardless of that answer, you've several times here used the term "on the button" haven't you? A. That's right. [1496]

Q. Now, by that do you mean a fine grading to the point that the form will fit as called for by the lay-out plans?

(Testimony of M. C. Schaefer.)

A. So that the concrete is at proper elevation, is right.

Q. So that the concrete is at proper elevation?

A. So that the excavation is at right grade, proper grade, that the excavation is made wide enough outside of the form work.

Q. And that the form itself is made right to fit that? A. That's right.

Q. Now, is it a fact, or is it not a fact, that your forms were always perfect?

A. Forms were perfect?

Q. Yes.

A. Oh, no, not by a long shot they weren't, because they weren't built the way we had designed in the first place; we would have much more use with a whole lot of less cutting off or patching to increase the length of the form panels.

Mr. Holman: Yes, sir; that's all.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, I believe you testified that \$4.00 per cubic yard of concrete poured would be a fair allowance, or reasonable allowance, for lumber for building those concrete forms, correct?

A. That's what I told Mr. Macri at the time, that's what I [1497] figured, about \$4.00, but I didn't want to have anything to do with lumber.

Q. I'm not asking about any conversation; I'm asking you if you did not testify that \$4.00 was a

(Testimony of M. C. Schaefer.)

fair allowance for the lumber per cubic yard of concrete poured, is that right?

A. I believe so, yes.

Q. Now, were you familiar with the lumber market at that time? A. I was.

Q. What price did you pay for lumber per thousand at that time; do you know, sir?

A. Now, then, on that, the price of lumber has been all over the board.

Q. Yes, I realize that.

A. From \$18.00 to \$70.00 a thousand.

Q. Just a moment, Mr. Schaefer, I'm asking you what the price of lumber was at that time.

A. I believe I at that time assumed that the lumber would cost about \$50.00 a thousand out here on the Roza job.

Q. About \$50.00 a thousand on the job?

A. I believe that was roughly it.

Q. Would that include plywood? A. No.

Q. And two by fours? [1498]

A. It would include two by fours and shiplap. It would not include the price of plywood. That's the unit price, of \$50.00. Your plywood there would probably run about eleven to twelve cents a square foot.

Q. Does that \$4.00 figure include the plywood, sir? A. I believe so.

Q. I didn't understand. A. I believe so.

Q. Do you know?

A. No, I don't. I didn't take a right down tight analysis of the lumber at that time.

(Testimony of M. C. Schaefer.)

Q. Then this \$4.00 figure that you gave is a rough estimate, is that right?

A. That's an approximate estimate, yes.

Q. Just an approximation. Now, I believe you also testified at the outset of this trial that a cubic yard of cement would require approximately 150 board feet of lumber?

A. A cubic yard of concrete, it probably would take a little more than that.

Q. It would take more than 150? 200 board feet? If I remember your testimony correctly on the outset of the trial you testified between 125 and 150 board feet.

Mr. Olson: I don't think Mr. Schaefer testified on that, Mr. Hawkins. I think Mr. Larson was asked about the contact footing, but I don't think Mr. Schaefer was. [1499]

Mr. Hawkins: Mr. Schaefer testified to that.

Mr. Olson: I think he did say something about 150 board feet; I believe he did say that.

Q. Per cubic yard? A. Per cubic yard.

Q. Mr. Schaefer, in connection with Exhibit 63, that was prepared at your direction, I believe you said, or at your request, not at your direction?

A. Yes.

Q. Now, with reference to Exhibit 63, you had that in your hands and were looking at it when you testified that each of these figures over on the right hand side were reasonable and fair figures for the work done, is that not right?

A. That's correct.

(Testimony of M. C. Schaefer.)

Q. Yes. Now then, when you testified that \$53,280.87 was the fair and reasonable cost of the labor on 1062, you were looking at this figure shown on Exhibit 63, were you not? A. That's correct.

Q. And your testimony that such figure was fair and reasonable is based upon Exhibit 63, isn't that right, sir?

A. It is based upon my own knowledge of the——

Q. It is based on—— A. Cost—— [1500]

Q. Your own knowledge, sir?

The Court: Wait until he finishes his answer.

A. ——of the labor, as well as that there is the figure taken from the certified transcripts of the payroll.

Q. In other words, it is based on your own knowledge, sir?

Mr. Olson: Your Honor, I think the question's been answered. That's exactly the same question counsel asked him previously and which he answered.

The Court: Well, I'll overrule the objection. It may be somewhat repetitious.

Q. It is based on your own knowledge, sir?

A. I haven't verified that there figure against the certified transcripts of payroll, but I have checked the payroll, and I'm still stating that there is the proper figure.

Q. In other words, if you'll excuse my interruption, the figure that you gave of \$53,280.87 is merely the figure furnished you by Mr. Hendershott, but

(Testimony of M. C. Schaefer.)

that that figure also is reasonably comparable to your own impression of the cost from your own knowledge, is that it? Do I state your position correctly? A. Yes.

Q. Now, then, how many man hours were spent on this job, sir?

A. I can't tell you that without checking back through.

Q. Without checking back through? [1500-a]

A. That's right.

Q. And as a matter of fact you couldn't tell me the actual cost of the labor on this job without either having Exhibit 63 before you or without checking back through, could you? Isn't that right, sir?

A. I'd have to refer to something, most certainly.

Q. Yes, and that's true with each one of the items that you testified to? A. That's right.

Q. You would either have to take the figure given you on Exhibit 63 or check back?

A. Well, I have seen it there, and made comparisons with the accounts.

Q. That is, comparisons with your impression of the accounts?

A. No, I've seen the figures of the accounts.

Q. Yes, you've seen the figures of the accounts, because they're in your office, isn't that right? The accounts are in your office, and you've gone over them from time to time; you're the head of this business, it's perfectly natural that you do that, isn't that right?

(Testimony of M. C. Schaefer.)

A. I've gone over those figures and listed some of the items myself previous to Mr. Hendershott making that survey.

Q. But the point I'm getting at is that the precise figure that you testified to, sir, you could testify to only if you had Mr. Hendershott's compilation before you; you [1501] couldn't remember what those figures were otherwise, could you, sir?

A. No, I couldn't tell you what any of those figures are on that there compilation right now.

Mr. Hawkins: That's right. I think that's all.

Cross-Examination

By Mr. Ivy:

Q. Mr. Schaefer, after you had your conversation with Macri in which you allege that an oral arrangement was made for extra compensation, did you keep any separate track of the extra costs?

A. Separating the costs?

Q. That's right. A. No.

Q. You have no means, then, of arriving at any figure that could be charged under your theory of the case to Mr. Macri under the so-called alleged oral contract?

A. The oral agreement was that he was going to be paying all the costs. There wasn't a dividing there between that which was contract and which was additional work, and you just couldn't possibly break down the number or give any definite proof that you were only going to be required to make,

(Testimony of M. C. Schaefer.)

we'll say, 25 trips, or 20 trips, from the yard to the job site, and that the rest of the hauling of the forms would be from structure to structure, as compared with the number of trips required and that we would make [1502] from the shop to each structure out in the field and back to the shop again with forms for repair; it's just a physical impossibility.

Q. Can you by date fix a time and place after which you assume that the original contract was abrogated and a new oral contract was substituted?

Mr. Olson: I don't think this is a proper cross-examination of this part of the witness's testimony, if the Court please.

The Court: Well, he didn't go into that this time but I'll permit the examination to go on.

Witness: That was April 29 in the field, on job 1062, and again a verification of that on June 15.

Q. What was that last, pardon me?

A. On June 15.

Q. Will you read to me, Mr. Reporter, what he said just prior to June 15?

(Whereupon, the reporter read the answer of the witness, as follows: "That was April 29 in the field, on job 1062, and again a verification of that on June 15.")

Q. Which date have you selected, Mr. Schaefer, June 15 or April 29?

A. Well, it was April 29, was the first agreement, and then the other was a verification of it.

Q. And your claim is an abandonment of the

(Testimony of M. C. Schaefer.)

original contract [1503] after June 29—after April 29, is that correct?

A. My claim is that we had then an oral contract.

Q. You what?

A. I say, my claim is that we then had an oral contract.

Mr. Ivy: That's all.

The Court: Any redirect?

Redirect Examination

By Mr. Olson:

Q. Mr. Schaefer, in response to Mr. Holman's question as to whether or not the forms were always perfect, you said they were not. Will you state why?

A. Well, the forms weren't perfect because the lumber wasn't perfect; we didn't have proper lumber to make the absolute proper form.

Q. Now, with reference to the labor charge that Mr. Hawkins was asking you about, Mr. Hendershott testified, I believe, that they were made up from the certified copies of the payrolls. Did you see those payrolls weekly, that I understand were certified by you?

A. I saw the payrolls, yes.

Mr. Holman: He didn't answer your question.

A. Well, the certified payrolls.

Q. Yes.

(Testimony of M. C. Schaefer.)

A. I saw the certified payrolls immediately after being made up, yes, and the payrolls——

Q. Were you through? [1504]

A. ——and the payrolls each week.

Q. The amounts shown on there for the labor, was that the prevailing wages at that time for the type of labor shown on your particular payroll?

A. Yes.

Q. And is that the reasonable cost of the labor at that time? A. It is.

Mr. Olson: That's all.

Mr. Holman: May I ask a recross question, your Honor?

The Court: Yes, all right.

Recross-Examination

By Mr. Holman:

Q. Did you in answering me, Mr. Schaefer, intend to inform me that the only forms that were not perfect were those that had improper lumber in them? Now, is that your intention, sir?

A. There are naturally some small errors in building forms. It's just inherent, and there wouldn't be anything unusual about that, but the unusual part of it is that we didn't have the type of lumber to make forms that we would have on that job, and further, we were required to build the forms to a specified length instead of to greater length so that they could have been used to more variety or length of structure wall.

(Testimony of M. C. Schaefer.)

Q. But is it or is it not a fact, sir, that there were [1505] improper forms sent out on that job, as a result of your own carpenters not building them properly? A. Not to my knowledge.

Q. Not to your knowledge, sir?

A. No, sir.

Q. Well, were they corrected? Were these errors in your yard corrected before they went out?

A. Not to my knowledge. There were forms in our yard that had been built for structures ahead, and we had to tear them apart to build forms for structures that we needed immediately, because we had a lack of lumber in the yard, if you want to get to that.

Q. Mr. Schaefer, I'm specifically asking you, sir, whether or not your own carpenters improperly built forms? A. Not to my knowledge.

Q. And how far does that knowledge extend, Mr. Schaefer?

A. To any time that I was around the job site or around the office.

Q. Have you gone over your current job reports, the reports made from Mr. Waltie and Mr. Darcy, the foremen, to you in Portland?

A. I've gone over them, yes.

Q. Yes, sir, and you tell me that not to your knowledge were there any improper forms built?

A. There may have been a boner pulled, and that's a thing [1506] that you would expect on a job like this.

Q. Now, counsel asked you, Mr. Schaefer, if you

(Testimony of M. C. Schaefer.)

saw your payrolls weekly, and in answering him you didn't answer as to weekly. Now, what is the fact as to whether you saw your payrolls weekly?

A. The payroll I did see weekly, but the transcripts of payroll, I saw them after they were made up, and they weren't made up weekly.

Q. No, sir; Mr. Schaefer, isn't it a fact that you didn't make up any payroll and certify it to send to the government from March 9 until October 18, and on October 18 you swore to all payrolls up to that time, is that correct or not?

A. I believe that's right.

Q. Yes, sir, and not until October 20, 1944, was there a single payroll of any kind in the office of the Bureau?

A. Up to what time?

Q. October 20.

A. That might be true.

Q. Well, let's see——

A. I believe that is according to the testimony I gave before, but I'll state here too that that isn't the usual thing.

Mr. Holman: I move that last be stricken, your Honor, as volunteered.

The Court: Yes, it will be stricken. Your counsel can bring out explanations if he wishes.

Mr. Hawkins: No recross.

Mr. Ivy: No.

The Court: Do you have anything further?

Mr. Olson: No, your Honor. That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Olson: If your Honor please, the plaintiff rests.

The Court: I assume there are motions you wish to make here. Would you like a recess first?

Mr. Holman: I think it would be very desirable. I'm willing to go ahead, whatever your Honor prefers, or later; recess or whatever your Honor prefers.

The Court: Well, if you're ready to present your [1508] motions we may as well proceed, until the regular recess time at quarter to three.

Mr. Holman: May it please the Court, the plaintiff having rested, both on his proof with respect to the pleadings as framed pertaining to specification 1062, schedule 1, and pertaining to specification 1068, as likewise fixed by the pleadings, the defendants Macri move for a dismissal of the action pertaining to specification 1062, schedule 1, on the following grounds and for the following reasons: That under the provisions of the sub-contract covering specifications 1062, plaintiff's Exhibit 5, it is provided in subdivision 18 of Article I as follows: I'm reading from my own copy, your Honor, so that if your Honor wishes to follow——

The Court: What part are you reading from now?

Mr. Holman: I'm reading from subdivision 18 of Article I, which is found on page 3, your Honor. Now, going back through the context, I read this to your Honor formerly: "The sub-contractor shall at his own expense do or cause to be done all of the following things in accordance with the provi-

sions of this agreement." That is the very start of Article I, then getting to this specification 18:

(Whereupon, counsel read subdivision 18 of Article I of plaintiff's Exhibit 5 to the Court.)

Mr. Holman: Coupled, your Honor, with provision 7 on page 2 of this same Article I, again specifying what the sub-contractor is to do:

(Whereupon, counsel read subdivision 7 of Article I of plaintiff's Exhibit 5 to the Court.)

(Argument to the Court.)

The Court: What I was trying to get at, was, who is the moving party under the pleadings here, of 1068, who has the burden of going forward with that? I don't know that we ever threshed that out entirely. The thought I had in mind, there has been evidence on both questions on the part of the plaintiff, but the thought I had in mind was, how could I, if I were in accord with the position of the defendants here, how could I at this stage grant a motion for dismissal, when concededly Mr. Schaefer has some \$14,000 coming on his sub-contract on 1062? I would have to assume that Mr. Maceri was going to win on the 1068 controversy, and recover more than \$14,000, wouldn't I?

Mr. Holman: I think that is correct.

The Court: So it seems to me we're having sort of a dress rehearsal in this argument. I have no particular objection to it. I like to get the position of the parties.

Mr. Hawkins: Under those circumstances, I think [1510] I will make my motion, and withhold

a lengthy argument until the close of the case. I move on behalf of the defendants Goerig and Philp, I challenge the sufficiency of the evidence introduced by the plaintiff, and move the Court for the entry of non-suit, dismissing the plaintiff's case in both of the actions now before the Court. As I understand it, the plaintiff Schaefer in 1062 is suing for damages and for his services, and so forth, and he is also in these actions suing for damages as a result of his claimed, or Macri's claimed breach of specification 1068, and it is our position that there has been no sufficient evidence introduced whatsoever in either of these cases to hold the defendants Goerig and Philp, for the reasons I have hinted at during the trial, and I think I argued them at some length in the other cases started on the 19th of February, 1947.

Mr. Ivy: If your Honor please, I think that the position of the Continental Casualty Company as to 1062 is a little different than the other two defendants, in view of the pleadings, which refer entirely, as far as the Continental is concerned, to 1062.

The Court: Yes, that's right.

Mr. Ivy: And so, on behalf of the Continental Casualty Company, I move for dismissal of them as to 1062, the only case in which they have been joined as far [1511] as the pleadings are concerned here.

The Court: But don't the pleadings show here that Schaefer is entitled to about \$14,000, in any event, on 1062, under his original sub-contract?

Mr. Ivy: If your Honor holds that it is under the original contract, that is correct, and the line taken by Mr. Hawkins would be the proper thing at this time for the Continental. However, an examination of the pleadings, your Honor——

The Court: I think the pleadings are not a suit on the contract, that's true.

(Argument to the Court.)

The Court: Well, I think that without passing upon these questions definitely one way or the other, at this time, I think that under the state of the pleadings and the evidence the case should continue with proof by the defendants, and then we'll thresh out those legal questions finally at that time, so far as this Court is concerned, at any rate. The motions will be denied and we'll adjourn until tomorrow morning at 10 o'clock.

(Whereupon, the Court took a recess in this cause until Wednesday, March 12, 1947, at 10 o'clock a.m.)

Yakima, Washington, Wednesday, March 12, 1947
10 o'Clock A.M.

(All parties present as before, and the trial was [1512] resumed.)

Mr. Holman: Your Honor please, I am associating with me Mr. Raymond Royal, a Seattle lawyer, who will assist me somewhat, and in a couple of days will move admission to the Court.

The Court: Yes, all right. In the meantime he may be associated here and practice in this case.

Mr. Holman: May it please the Court, in regard to the letter filed as Macri's identification 73, I think the last one pertaining to the Glens Falls Indemnity Company, I have checked the matter and I am convinced that I can obtain no process out of this Court that would be effective in San Francisco, where the application is lodged, and I would like to hold the matter in abeyance. In other words, I am satisfied that a subpoena out of this Court would be effective on Mr. Hunter, as having been a witness on the stand, but certainly not the San Francisco people, which would require a deposition, and frankly, the matter of inquiry would be too collateral to ask for a delay for deposition, so that's about the place I find myself in on this identification 73. I would like to offer it in evidence only for the purpose of continuity of the record with respect to the application, your Honor. I don't know whether counsel will object or not. If he does, I'm not going to resist. [1513]

Mr. Olson: I don't feel like consenting to the letter going into evidence, your Honor. It is a letter written by Mr. Hunter to myself, certainly has no materiality in this case. I submitted it to the Court for the Court's information.

Mr. Hawkins: I think the reference to Mr. Holman is probably self-serving.

The Court: Yes. I'll sustain the objection.

Mr. Olson: I would like to withdraw the identification if Mr. Holman will permit.

Mr. Holman: I certainly will, if you will give me the paragraph pertaining to me.

Mr. Olson: Well, I would just as soon leave the original.

Mr. Holman: May I proceed with the defendants' case?

The Court: Yes.

Mr. Holman: I'll call as the first witness Mr. George Staples.

GEORGE STAPLES

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Will you please state your name and your place of residence? [1514]

A. George Staples, Couer d'Alene, Idaho.

Q. And Mr. Staples, in the year 1944 did you become associated with Macri and Company for the purpose of performance of government specification 1062, schedule 1, of the Roza Project?

A. Yes.

Q. Will you please tell me how you became associated? I mean, did you make application, or were you sought out?

A. When I read in the paper that Mr. Macri was low bidder on schedule 1062, I called him in Seattle by 'phone and asked him if he had the personnel lined up for the job. He said no——

(Testimony of George Staples.)

Mr. Olson: I think that the conversation——

Q. That conversation would be hearsay. In other words, you telephoned Mr. Macri?

A. Yes.

Q. And then will you tell me whether or not you went to Seattle to interview Mr. Macri?

A. I did.

Q. And as a result of that interview were you employed? A. I was.

Q. In what capacity?

A. As superintendent.

Q. And tell me whether or not you were given instructions to line out and prepare for job performance? [1515]

Mr. Olson: I think the question is asking for the substance of the conversation, it seems to me.

Q. Well, all right, tell me what your instructions were?

Mr. Olson: The same objection, your Honor. It seems to me that's asking for a conversation.

The Court: Well, I'll overrule the objection.

Witness: My instructions were to inspect the job site and contact the engineer and secure maps and working drawings of the work to be performed on the contract, and to look over the field with a view of selecting a camp-site, and to consider all branches of the work, the various departments, and set up a tentative schedule of work and the equipment that was needed to perform that work, and the manpower that was needed to perform the work. Mr. Macri told me——

(Testimony of George Staples.)

Q. Just a minute, don't take conversation; just go on and give me your instructions.

A. I was instructed to lay out the whole job just as though it were my own job, and set down all of the materials and labor and equipment required for the job, and when I had completed that, to contact Mr. Macri in order to check it over, and if he OK'd it, why then we were ready to proceed.

Q. And in those instructions were there any given with respect to renting equipment or using the Macri equipment? [1516]

A. Yes, I was told to keep an eye out for equipment that was in the locality. Transportation was difficult in that period, and anything that could be secured locally on rental or purchase, we were to secure that way, otherwise it would be shipped in from some other job.

Q. And do you have a record with you, Mr. Staples, did you bring it this morning, with reference to the equipment with which the job was started? Do you have that here, or is it over at the hotel?

A. I don't have it here.

Q. Very well, I'll pass that. Now, what basic document furnished by the government did you use to determine right of way for the purpose of performance of the item of clearing as shown on the specifications?

A. I have the map here.

Q. Is this is?

A. Yes.

Q. May I have this marked for identification, Mr. Clerk? Roughly, will you say what this is, Mr. Staples?

(Testimony of George Staples.)

A. It's a map showing each lateral and sub-lateral separately, to show the pipe line, open trench, structure, and give the government right of way in its several widths.

Q. Now, on that, did you make any additional markings or indications?

A. I believe not. [1517]

Q. And the other you have is what?

A. This is a general lay-out plan of the project, showing roads.

(Whereupon, maps showing laterals and rights of way were marked defendant Macri's Exhibit No. 74 for identification.

(Whereupon, maps showing location of camp site and roads were marked defendant Macri's Exhibit No. 75 for identification.)

Q. Handing you identification 74 and 75—would you like to look at these, Mr. Olson?

Mr. Olson: I do if you're going to offer them in evidence.

Mr. Holman: I'm going to offer them in evidence, yes.

Q. Each of these blue prints you received from the Bureau of Reclamation, did you, Mr. Staples?

A. Yes.

Q. And any markings which are foreign to the production of the blue prints themselves were placed on by you, or under your direction, correct?

A. Yes.

Q. By the way, while counsel's assistants are

(Testimony of George Staples.)

checking that, will you state into the record your general qualifications, Mr. Staples, please?

A. Well, in construction, after the first World War I was [1518] employed by the Department of the Interior, the General Land Office, at Denver, Colorado, for a survey in Hayden National Forest, Colorado, and La Bonte Canyon in Wyoming. My job was flagman, and I was later promoted to principal assistant, which was third in rank of a party of 25 men divided into two surveying crews, the chief of the party being a cadastral engineer, and the next in line being a surveyor or instrument man, and my work there covered both plane and cadastral surveying.

Q. What is cadastral surveying?

A. Well, plane surveying assumes that the field that you're covering is perfectly level, and you carry your lines out and make your measurements without taking into consideration the earth's curvature; that's principally it.

Q. Well, does it or does it not involve the matter of determination of topography?

A. Pardon?

Q. Does it involve topography, determination of topography? A. Yes, it does.

Q. And in that connection, due reference to sea levels?

A. Yes, elevations and inclinations of hills and mountains are determined with the use of a clinometer, although that type of work is not especially elevation work, although it is covered. [1519]

(Testimony of George Staples.)

Q. Now, will you go on with reference to any subsequent experience you had, particularly with any government projects?

A. Well, in 1937 I entered the subdivision and construction of house building, and set up my own office, which I operated for three years. In developing the subdivision I secured the services of a registered surveyor, whom I assisted in making the survey of the ground to be sub-divided work, by making contour maps, which was all entirely elevation work, showing the different levels and the contours, and carried on this work until defense work started.

Q. That is, on World War II?

A. In World War II, and when defense work started I was employing carpenters at I believe it was \$1.10 an hour, and the scale had risen to about \$1.35 an hour, and my crew went with the government, and I cleaned up my affairs and I went along with them, went to the job at Fort Warren, Wyoming.

Q. Pardon me, where was this subdivision work, in what State? A. In Cheyenne, Wyoming.

Q. All right, sir.

A. And I was employed by the government working on equipment, keeping equipment records in regard to their performance and their breakdowns and repairs, and also the hours and [1520] the amount of rental that they drew, and when that job was completed I came to Idaho to look after some property I had had there for a number

(Testimony of George Staples.)

of years, with the idea of building on it, and priorities being out of my reach, I was unable to do anything with it, so I went to work for the Ordnance Depot at Hermiston, Oregon. I was employed there in the equipment department, and assisted the Army Engineers in keeping graphs and statistical data on equipment, equipment operations, and materials, until the latter part of that job, when I was changed over to inspector of general construction.

Q. I'll ask you whether or not in connection with the inspection of general construction you had any occasion to inspect any work that had been done by M. C. Schaefer, doing business as the Concrete Construction Company? A. Yes.

Q. What was it?

A. Concrete Construction Company were subcontractors on the building that I was to inspect, inspectors' work shop. They performed the concrete work.

Q. And you inspected that later, after it was done, did you, sir? A. Yes.

Q. In other words, what I'm interested in, did you have any direct negotiations with the Concrete Construction Company [1521] or did you just inspect the work completed by them?

A. I had no negotiations with them. I was just inspector to the building, and on the building we had concrete inspectors.

Q. Well, will you state, please, whether or not that was the basis for your contact with the Concrete Construction Company whereby you wrote

(Testimony of George Staples.)

this letter which is in evidence as defendant's Exhibit 33? You recall the letter that was introduced here? A. Yes.

Q. I'm referring to the letter of March 2 on Macri Company's stationery, or rather, pardon me, the answer of March 2 on Macri Company stationery, and the letter, that's your signature?

A. Yes.

Q. And the reference on the bottom "P.S. Tell Bill I'm coming to Portland one of these days to get that free feed," to whom does that refer?

A. To William Schaefer.

The Court: May I see the letter, please?

Q. Yes, your Honor. I had that early in the case. Mr. Schaefer identified that, your Honor, and it was admitted, Mr. M. C. Schaefer. Had you become acquainted with Mr. William E. Schaefer on that job? A. Yes, I had. [1522]

Q. Now, with reference to writing the letter and receiving the answer, will you explain to the Court how and why that letter was written by you?

A. At the time that letter was written we had had a number of sub-contractors calling at my house, that was before the camp was set up, I believe——

Q. Where was your house?

A. At 209 South 4th Street, Yakima, inquiring about the possibilities of subbing work on contract 1062. We had applications or inquiries for all phases of the work. It had not been considered from the angle of sub-letting any of the work, and

(Testimony of George Staples.)

the inquiries that came in I referred to Mr. Macri and disregarded them until I had occasion to call on Osberg & Ludberg to make arrangements——

Q. Who were they?

A. General contractors on the main line canal.

Q. On the Roza Project

A. Yes—to make arrangements for our electric light service, electric power service, at our camp site, and in the conversation it came out that they wanted someone to take over the concrete pouring of the lining on the main canal, which amounted to a sizeable yardage. I thought it over a while and thought that probably there would be enough work in there for a concrete outfit to come in and sub those jobs on a pretty nice arrangement to all concerned, [1523] so I wrote the Concrete Construction Company to ask them if they were interested in subbing this contract, the concrete pouring, and also to find out if they would be interested in these other contracts.

Q. Now, in this letter, Exhibit 33, directing your attention to the last paragraph, in which you say “If you’re not interested, would you rent or sell two transit mixers?” what was the basis for that inquiry? A. Well, I had instructions——

Mr. Olson: If your Honor please, I don’t see——

The Court: I think instructions should be admitted only as preliminary. The question is what he did, not what he was instructed. I’ll sustain the objection to that.

Q. What did you do with respect to endeavoring to secure transit mixers?

(Testimony of George Staples.)

A. I inquired around among builders that I came in contact with, to see if we could secure transit mixers, and in writing that letter of March 2 I queried the Concrete Construction Company to see if we could rent or buy transit mixers from them.

Q. What is a transit mixer?

A. Well, it is an agitator, a large drum agitator, mounted on a truck and hooked up in such a way that it mixes the concrete in transit from the batching plant to the point [1524] where it discharges its cargo.

Q. And were transit mixers in use upon other jobs in the Roza district at that time?

A. Yes.

Q. Now, with reference to identifications 74 and 75, will you please explain to the Court how they were used with respect to the right of way, with respect to roads, and with respect to the area for clearing?

A. The location map shows the Macri campsite and the county roads and access roads that lead out of it to the entire project 1062. Where black-top roads came on or near the project they are indicated on the map, and the crayon lines are through roads which would be for good travel, for heavy traffic, to main points in the project.

Mr. Holman: I am going to offer these in evidence, your Honor. In fact I'll offer them now, and if counsel has objection I would like to en-

(Testimony of George Staples.)

ertain it, because I would like the witness to explain the road set-up to your Honor from the map.

The Court: Well, which one are you offering now?

Mr. Holman: Both 74 and 75.

Mr. Olson: I have no objection, your Honor, if it is understood that the matters other than the blue print portion of the map were put on, I assume, by this witness. [1525]

Mr. Holman: Yes, he's already answered that they were.

The Court: Yes, he stated that. Admitted, both 74 and 75.

(Whereupon, defendant Macri's Exhibit No. 74 for identification was admitted in evidence.)

(Whereupon, defendant Macri's Exhibit No. 75 for identification was admitted in evidence.)

Mr. Hawkins: Your Honor, I wonder if that deposition could be published at this time? I'd like to look at it.

The Court: Is that the Philp deposition?

Mr. Holman: The Nelson deposition, and I join in that offer.

The Court: Was the Philp deposition published in this case?

Mr. Holman: No.

The Court: Is there any objection to the Nelson deposition being published?

Mr. Holman: We make application to have the Philp deposition published in this case.

(Testimony of George Staples.)

Mr. Olson: The Macri deposition has been published, has it not?

The Court: No, Mr. Macri is present.

Mr. Olson: Well, I'd like to make application for [1526] the Macri deposition to be published.

The Clerk: The whole deposition, your Honor, came in one envelope, and I have it marked as having published on the 21st of February.

The Court: That is the Philp?

The Clerk: Well, they're all in one.

The Court: Well, they're all opened up and published, then. I'm not just sure as to the extent to which a discovery deposition may be used where the party is present in Court. We can consider that later, if it is shown published here by the Clerk.

Mr. Olson: This Nelson deposition apparently came in this morning, and my copy hasn't arrived yet. I assume it will be here before the day is over.

The Court: How do you propose to handle it? Do you want to read it to the Court?

Mr. Holman: Yes, your Honor. I furnished Mr. Olson my copy, which I have not had a chance to read.

The Court: Do you wish to withdraw this witness?

Mr. Holman: No.

Mr. Hawkins: I asked that it be made available so I could thumb through it.

The Court: Oh, I see. Well, it is published now, so you can go ahead.

(Testimony of George Staples.)

Mr. Olson: I appreciate your offer, but I can't read that deposition and follow the witness' questioning at the same time.

Direct Examination

(Continued)

By Mr. Holman:

Q. Now, Mr. Staples, with reference to Exhibits 75 and 74, will you please explain to the Court what was the outside limit of area within which the work of specification 1062, schedule 1—what was the right of way limit, and show the Court on that, and what you did with respect to clearing?

A. The map shows——

Q. You're talking from 75, now, are you not?

A. Yes.

Q. All right.

A. The map shows the outside boundaries of the project 1062, schedule 1 as well as schedule 2, and the crayon drawings or markings are merely the better through roads that were existing at the time the work was started. It also shows the lateral locations and the main canal.

Q. Well, how wide was your area there for clearing, Mr. Staples?

A. There were two widths of the government right of way. A pipe line trench I believe was ten feet, and open ditch was approximately fifteen feet, but I'm not sure of those dimensions. I am sure that the pipe line trench required less ground than the open ditch. [1528]

(Testimony of George Staples.)

Q. Now, was that clearing done?

A. Yes.

Q. Under your direction?

A. Yes, it was. The clearing was done from this other exhibit.

Q. With reference to 74, then, can you point out or show where the clearing was indicated?

A. The clearing was started from the first lateral to the west, which was 59.3/10. The work commenced with the stilling pool that took off of the main canal and entered structures number 1, 2, and 3, and the clearing equipment and crew proceeded down the lateral and sub-laterals along this right of way, and from there moved over to the next lateral to the east, and continued on until all laterals had been cleared and grubbed, and the rubbish removed and burned; all vegetative matter had been taken out.

Q. Yes, sir; now, there was not a separate unit of clearing, was there, Mr. Staples? In other words, was it a component part of the excavation unit, or not?

A. No, there was a separate crew and separate equipment.

Q. Well, I meant with respect to pay amounts, or do you know or recall?

A. Well, clearing and grubbing was included as a separate item, I believe. [1529]

Q. You haven't checked that, and you don't recall; you're just testifying to memory?

A. No, I'm not sure.

(Testimony of George Staples.)

Q. Now, what was the fact with respect to the general accessibility of the cleared area as a means of travel over the course of the main canal and the laterals?

A. At the commencement of the job county roads had to be relied on for approaches to the different laterals and separate stationing on the laterals. After the work had progressed the clearing crew made accessible roadways down the laterals, so that it was possible to travel over every lateral on the project. This road condition was improved when the open ditch crew pioneered with a dozer and blade, and any place they came to that was inaccessible they were instructed to make accessible an approach to pipe line trenches and to structure locations, so that the crews that were following, for instance, the back hoe, when it got there it had a place mostly built up for it so it could set up and go to work.

Q. You've used the term "dozer." Now, what does that mean in construction?

A. A 'dozer is a tractor.

The Court: A bulldozer, isn't it? Is that what you mean?

A. Yes. [1530]

Q. And a blade is what?

A. A blade is a motor patrol or a street maintainer that has a twelve foot blade in approximately the center or a little forward of center of the wheels, to level off ground or gravel or whatever material that you want, in road construction.

(Testimony of George Staples.)

Q. And what is a hoe?

A. A back hoe is a power shovel that bites into the earth and pulls the earth toward the equipment, toward itself, and then raises and deposits it outside of the area.

Q. Can you tell me whether or not along this cleared area of right of way that you testified about there was available a course for general travel of power equipment operating under its own power?

A. Yes.

Q. And was that used while you were there, continuously for that purpose? A. Yes.

Q. By the way, Mr. Staples, how long were you on this job?

A. From the latter part of February until June 22.

Q. February, 1944? A. 1944.

The Court: Until June 2?

A. 22.

Mr. Holman: At this point, your Honor, I would [1531] like to withdraw this witness. You may cross-examine.

The Court: You wish to withdraw him and then recall him later in the trial?

Mr. Holman: Yes, I do.

The Court: Do you wish to cross-examine, Mr. Olson, as far as he's gone?

Mr. Olson: I suppose when counsel puts him back on, I suppose it will be on a different phase?

Mr. Holman: Yes. This is just identification.

The Court: I think you had better cross-examine now. We can keep it straighter that way.

(Testimony of George Staples.)

Cross-Examination

By Mr. Olson:

Q. You say you were on the job until June 22?

A. Yes, sir.

Q. And on that date you terminated all connection with 1062? A. Yes.

Q. So that you weren't on the job at any time while any concrete pouring was done?

A. No; no pouring while I was there.

Q. Now, you say you were employed by the Department of Interior in the General Land Office? A. Yes.

Q. What kind of work did you do for the Department of Interior? A. Surveying.

Q. Are you an engineer, Mr. Staples? [1532]

A. I am not.

Q. You say you are not. How long ago did you work for the Department of Interior?

A. Right after the first World War; probably it must have been about 1920.

Q. And what specifically did you do with reference to surveying?

A. I started out as a flag man.

Q. What does a flag man do?

A. A flag man goes ahead and flags a point in front of an instrument.

Q. That requires no technical knowledge, does it, Mr. Staples? A. No.

Q. And that's the type of work you did working for the Department of the Interior?

(Testimony of George Staples.)

A. I did that for about two weeks, then I went into various phases of it until I was principal assistant.

Q. Well, just what did you do, Mr. Staples? That's what I want to know; what did you do?

A. As principal assistant?

Q. Yes.

A. Well, for one thing, we would get up in the morning about two or three o'clock whenever we moved to the new camp, and we'd take a shot at Polaris and establish our meridian. [1533]

Q. Do what?

A. Took a shot at Polaris, the north star, and establish our meridian, which had to be done in this case.

Q. Mr. Staples, I'm not asking what "we" did; I want to know what you did, yourself. You started out as a flagman. Now, did you operate instruments yourself, and determine elevation?

A. Not a transit. I operated a clinometer myself.

Q. What kind of machine is that?

A. That's to take sub-grades of hills and mountains.

The Court: It's a little hand level about four inches long, isn't it, Mr. Staples?

A. Yes, except that it has an angle on it, to give the angle, so that when you're triangulating the distance of a point probably a mile away, you run out a base and get the two angles of the base and flag a point ahead and compute the distance,

(Testimony of George Staples.)

without actually surveying it. You take the clinometer and go out and measure your angles and that way you can allow for the curvature, so that you can measure or compute the distance just as though you would run it out in a straight line.

Q. And for what purpose was this being done?

A. Sectionizing on original and re-surveys; part of it had never been surveyed, some of it had.

Q. Well, was it for the purpose of making maps or putting in [1534] roads, or what?

A. Putting in the section lines.

The Court: That's on government land?

A. Yes.

The Court: The Court may have the advantage of counsel, having operated for two years in a government survey.

Q. Well, then, was your work with the General Land Office in the national forest along that same line, then?

A. Yes, that was.

Q. Laying out section lines?

A. Yes.

Q. And after that, then, as I understand, you went into the building business, subdividing land and building homes?

A. Yes.

Q. And after that, that was in 1937 or during that time, you hired an engineer to do your surveying for you, and you worked with him?

A. Yes.

Q. How big of a place was that that you were subdividing?

A. I had a contract on forty acres for the first development, and there was additional land that I never got to on account of the war.

(Testimony of George Staples.)

Q. And you were surveying that for the purpose of subdividing it and giving the lot lines, was that the idea? [1535]

A. Well, in order to have it approved for building and loan, F.H.A. loans, we had to run aerial surveys and make aerial maps, and then run contour maps to show the lay of the land, to submit it to Washington, D. C., for approval as a subdivision, in order to qualify for the 90 per cent loans.

Q. Well, the aerial map is a matter of photography, isn't it? A. Yes.

Q. What you were surveying this for was so that you could plat it out and show the lot lines which you proposed on your subdivision?

A. No, the lot lines were run, but the principal work of laying that out for approval was the securing of the elevations, the different elevations, the contours, to show whether the ground was adaptable for home building.

Q. All right; well, then, apparently, as I understand it, the war started and your crew left you, so you went into the government work?

A. That's right.

Q. And your work there consisted of keeping the equipment records? A. That's right.

Q. That had nothing to do with construction work?

A. It was construction equipment.

Q. Yes, but you were keeping equipment records. Just what [1536] did you do there?

(Testimony of George Staples.)

A. Well, I'd go out on the job and inspect equipment and see if it was operating; if it was down I'd find out why it was down, to try to determine the cause, and keep track of the time it was down, and also keep track of how much work the particular piece of equipment had performed. It was a record of the equipment on the job, just to show operations and show repairs and causes of breakdowns.

Q. In other words, that was mechanical data that you were obtaining and checking?

A. Yes.

Q. Had nothing to do with Bureau of Reclamation work at all?

A. It wasn't the Bureau of Reclamation.

Q. And then after that you became inspector of general construction?

A. No, I was on equipment. I was inspector of general construction for one building. That was the last three months of the job in Hermiston.

Q. Then with the exception of that last three months your work during the defense period was all equipment data and graphs?

A. Up to that time, but not after that.

Q. Well, as I understand it, you only spent three months as a construction inspector, and that was on one building?

A. That's right. [1537]

Q. The building built by the Concrete Construction Company?

A. No, they were sub-contractors handling the concrete work.

(Testimony of George Staples.)

Q. I see, it was a building, then, upon which the Concrete Construction Company sub-contracted concrete work? A. Yes.

Q. And that's the only construction inspection, or superintending inspection, I guess you said it was, that you did during the period that you have related? A. Up until that time.

Q. Well, did you afterwards do some inspection on building and construction work?

A. I did construction work.

Q. Where was that?

A. Well, out at Farragut I was an estimator of construction on all types of buildings.

Q. Where was that? A. Farragut.

Mr. Holman: Where is Farragut?

The Court: On Pend Oreille Lake.

A. Pend Oreille Lake, Idaho, Naval Base.

Q. That again was buildings, was it not?

A. That was all types of construction on that project.

Q. Yes, but the types consisted of building, didn't they?

A. Well, building roads and sewage disposal plants and buildings. [1538]

Q. All right, what was your position?

Mr. Holman: Just a minute, let him finish his answer.

Mr. Olson: I thought he was finished.

Mr. Holman: No, he wasn't.

A. The building project there was identical to setting up a city for 30,000 people, with all its utilities, facilities, dwellings and business operations.

(Testimony of George Staples.)

Q. And what did you do there?

A. I was an estimator.

Q. An estimator for whom?

A. For Walter Butler Company.

Q. For who?

A. Walter Butler Company, a Minneapolis contractor.

Q. What portion of the project did you estimate?

A. The principal work was making quantity surveys of materials.

Q. For what?

A. Well, earth moving, concrete, steel re-inforcing, lumber and brick, concrete block, nails, and all materials that go into general construction.

Q. That was on behalf of a private concern, was it, you say? A. Yes.

Q. Were you the only estimator working for this outfit?

A. No, there were four estimators. [1539]

Q. Well, were you checking other figures, were you, Mr. Staples?

A. No, making original estimates. The department I was in was in the chief engineer's office. The estimates we made were for the purpose of procuring materials, they were not cost estimates.

Q. In other words, your work was entirely with quantities?

A. Principally with quantities.

Q. So that after your company, your employer, had the work to do you would make estimates of

(Testimony of George Staples.)

the quantity of materials required so that they could go out and order it? A. That's right.

Q. Now, you say on this 1062 you tried to get some transit mixers? A. Yes.

Q. And ascertained that none were available, is that right?

A. Well, none were available quick enough for us.

Q. And you had a good many applications, as I understood you to say, for sub-contracting on 1062?

A. Yes.

Q. But you on your own initiative wrote to the Concrete Construction Company, exhibit 33, I believe it was, and asked them if they were interested in this job? A. Yes.

Q. They didn't get in touch with you first, that's correct, [1540] is it not?

A. I believe they called me first, and I referred them to Mr. Macri.

Q. Well, isn't it a fact, Mr. Staples, that the first communication was this letter from you to them, and then they called you back?

A. Well, that could be; I don't remember.

Q. You didn't say anything in your letter about them having called you, did you? A. No.

Q. Your letter is an inquiry to them to see if they're interested? A. That's right.

Q. Now, do you mean to state, Mr. Staples, that you constructed roads up and down these laterals to each of the concrete structure stations?

A. Constructed right of ways, cleared right of ways.

(Testimony of George Staples.)

Q. By that you mean you took the sage-brush off? A. That was part of the operation.

Q. What else did you do?

A. Well, we grubbed the earth and disposed of the material we took out of it. It is a government right of way for the laterals, and it's not a road-way in itself.

Q. Well, I understood you to say, Mr. Staples, that you prepared and constructed roads to every one of these concrete [1541] structure station. Now, did you or didn't you?

A. By the time we had completed the grubbing and the clearing there was access to all points of the laterals on the entire project 1062.

Q. Well, that's where they put the canal, wasn't it; I mean the ditch?

A. That's right, but there was no ditch there.

Q. Yes, but after the ditch was put there, which was done at the same time that these structures were excavated for, you couldn't go down there, could you? A. Yes.

Mr. Hawkins: I object to that. The question is not based on any evidence in the record.

Mr. Holman: I join, your Honor.

The Court: Overruled. It's time for a recess here. Before recessing I just want to refer again to the matter of these depositions. We have a rather unusual situation, because the envelopes were opened and they were published in one case. It runs in my mind, Mr. Olson mentioned Mr. Macri's deposition early in the trial, and I was under the

(Testimony of George Staples.)

impression that since Mr. Macri was present, it probably couldn't be used except on cross-examination or rebuttal. I notice on checking over the deposition rules of the rules of civil procedure, it is rule 26, subdivision D, it provides that upon a trial or [1542] upon other matters any part or all of a deposition so far as admissible under the rules of evidence may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions; then subdivision 2 provides the deposition of a party or or anyone who at the time of the taking of the deposition was an officer or agent, and so forth, may be used by an adverse party for any purpose. Now, I call that to counsel's attention, because it would seem to me that would give Mr. Olson the right to use the deposition or publish it.

Mr. Holman: I have not resisted that. There's been no application in the case in chief.

The Court: Mr. Olson mentioned that, and you said Mr. Macri was present. I was under the impression it would not be proper to use it, since Mr. Macri was here. In view of that situation I'm inclined to entertain a motion by Mr. Olson to use that as part of his case, if he wishes to do that.

Mr. Holman: I'll be very glad; I won't resist that.

The Court: I may have the wrong impression, but my view is that Mr. Olson has the right to use it for any purpose, if he cares to do so. [1543]

(Testimony of George Staples.)

Mr. Olson: I didn't have in mind using it as part of my case, your Honor, but for the purpose of cross-examination.

The Court: It is here; I just wanted to be sure you understood the Court's position.

Mr. Holman: I do intend in due course to use the deposition of Mr. Philp in this case.

The Court: Well, that's a different matter. I think that would be available for use by either party. He isn't here.

Mr. Holman: The only thing I'm not clear about is whether this combination of depositions has been opened in this case, or published in this case. It was published in the five cases that were consolidated. I don't know whether Mr. Olson made the request that they be published in this case. If he did, I would like to join also.

The Clerk: The deposition was originally opened and filed in this case.

The Court: Well, I think the record should show that the depositions of Mr. Philp and Mr. Macri and Mr. Schaefer have been opened and published in this case.

The Clerk: And Joe Macri and Don Macri were also included in those depositions, besides Sam Macri.

The Court: We'll recess, then, for ten minutes.

(Short recess.) [1544]

(Testimony of George Staples.)

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Staples, we were just talking about the roads. It is a fact that the roads, or the roadway that you referred to, was the cleared right of way for the laterals on 1062?

A. At that time it was.

Q. Well, yes, that's the only clearing that you made, wasn't it, was for the right of way for the lateral ditch and pipe line?

A. At that time that was all that was made, yes.

Q. And were you there when the ditch was put down, the lateral was excavated?

A. Quite a lot of it.

Q. That was sub-contract, was it not, to Morrison? A. No.

Mr. Holman: May it please the Court, I think the witness should have a chance to finish his answer.

The Court: Yes, let him finish. Had you finished your answer?

A. Yes, sir. That work was not sub-contracted at the start. I supervised the pipe trench and the open trench digging for at least the first two laterals.

(Testimony of George Staples.)

Q. And that first two laterals, the open trench digging that [1545] you did, was done right down this cleared right of way, wasn't it? A. Yes.

Q. Then it wasn't any longer a road, was it?

A. Yes.

Q. Still was. How deep was the ditch that you dug?

A. Varied all the way from one and five tenths up to three feet.

Q. In depth? A. Yes.

Q. And the right of way that you cleared was how wide?

A. I'd have to refer to the map to see definitely what the width is; it varied.

Q. Well, you indicated, I believe, that it was from ten feet to fifteen feet in width?

A. That's approximately what it is.

Q. And this ditch went right down the center of it?

A. Yes, where the ditch line ran; part of it was pipe trench and part ditch.

Q. How wide was this ditch you dug?

A. At about a 24 inch base. I don't remember the width from brim to brim. It would probably be three feet, four feet.

Q. And then the dirt was piled up, I suppose, alongside? A. It was banked on either side.

Q. Pardon? [1546]

A. It was banked on either side.

Q. Now, did Morrison-Knudson go to work while you were still on the job?

A. They never went to work.

(Testimony of George Staples.)

Q. Or Morrison, I mean? A. Yes.

Q. They went to work while you were still on the job? A. Yes.

Q. So that they were excavating for the pipe trench and for the open ditch prior to June 22, 1944?

A. They excavated for open ditch. They never dug pipe trench. We handled that all the way through the job. They did, prior to June 22.

Q. Did you build any other roads other than this right of way that you cleared for your canal, your laterals?

A. Yes. When the grubbing crew had finished, we had access, we had a roadway, to every part of every lateral. When the pioneering was done for the open ditch the movement of that equipment over there made us additional roads, and in places where the equipment had to travel only on the right of way, and there was a hill or a place where we couldn't get through with our trucks, why, they knocked it out, just punched it out so that it was accessible and you could travel right along each lateral beside the open ditch. [1547]

Q. Now, Mr. Staples, isn't it a fact that you refused throughout the time you were there to make any roads available for the Concrete Construction Company? A. No.

Mr. Holman: Just one minute. Your Honor, I object to that as improper cross-examination.

The Court: He testified about building roads here, didn't he?

(Testimony of George Staples.)

Mr. Holman: Yes, but now counsel asked him if he refused to build roads for the Concrete Construction Company.

The Court: Overruled.

Mr. Holman: Well, he hasn't answered that question.

The Court: Yes he did. He said "No."

Cross-Examination

(Continued)

By Mr. Olson:

Q. Isn't it a fact, Mr. Staples, that you told the Concrete Construction Company that you had no responsibility as far as making roads was concerned? A. The road question came——

Q. I'm asking you, didn't you tell them that, that the roads were no affair of yours or of Macri Company?

A. Well, I don't remember that.

Redirect Examination

By Mr. Holman:

Q. Well, what did you tell them? You started to give an [1548] answer.

A. Not having any request to make a road, I don't recall anything about roads coming up. I never had a request made to me to give a road. Now, whether or not I would have made the road, right now I don't remember whether it was my responsibility or whether it wasn't.

(Testimony of George Staples.)

Mr. Holman: Pardon me, did you have any questions?

Mr. Hawkins: I have no questions.

Mr. Ivy: No questions.

Redirect Examination

(Continued)

By Mr. Holman:

Q. Counsel asked you about Morrison and Knudson, and then you changed and said Morrison. Was that H. H. Morrison Company?

A. It was James Morrison.

Q. James Morrison; and what was their operation? I believe you said they excavated for the open ditch, and did what else, do you remember?

A. They dug the open ditch. I believe that was all.

Mr. Holman: Thank you. That's all, Mr. Staples.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Holman: Your Honor, I would like to make application at this time to read the deposition of Mr. Nelson as next in order of our proof.

Mr. Olson: If you Honor please, I would very [1549] much prefer that it wait until I get my copy of the deposition. I called my office again during the recess and it is still not there. I don't understand why counsel has his copy and the original is here, and my copy isn't, but it's a little hard to follow.

Mr. Holman: Counsel understands as well as I do both counsel ordered it. I presume the reason was that the bill was in mine. I am glad to have counsel use my copy.

The Court: Well, will it inconvenience you very much to wait? I think counsel should have an opportunity to look over his copy.

Mr. Olson: Mine should be here during the day, I assume.

Mr. Holman: The reporter just happens to be a stranger to both Mr. Olson and me.

Mr. Olson: No, I'm not indicating anything out of the way, except I haven't got it, that's all.

Mr. Holman: I would like at this time, your Honor, to read, just for the purpose of progressing, I would like to read into the record the deposition of Mr Philp.

The Court: Yes, all right.

Mr. Hawkins: I understand that this is being read as part of defendant Macri's case, and of course not part [1550] of the plaintiff's case. It was never read into the record as part of plaintiff's case at all.

Mr. Holman: That's right, sir. This is read for the purpose of the cross-complaint features of Macri against Goerig and Philp; and would you kindly cooperate with me by reading either the questions or the answers?

Mr. Hawkins: Is that necessary? I'll be glad to do that.

Mr. Holman: I will appreciate it.

(Whereupon, counsel read the deposition of Clyde Philp as follows:)

“CLYDE PHILP,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, deposed and said as follows:

Direct Examination

By Mr. Holman:

“Q. Will you give your name, please?

“A. Clyde Philp.

“Q. You live where, Mr. Philp?

“A. At 2933—Second Avenue, Seattle, Washington.

“Q. Are you willing, Mr. Philp, that this deposition which is being taken may be transcribed without your reading the completed copy and without your signature thereto under the Federal Rule?

“A. Yes.

“Q. So you waive that, do you? [1551]

“A. Yes.

“Q. In the record?

“A. Yes.

“Q. What is your relationship,—contractual relationship with respect to the Roza Work performed by Macri & Company involved in this action, being Bureau of Reclamation, Department of Interior, contract 12r14996, including specification No. 1068 for performance of earth work, pipe line, structures, laterals, sub-laterals, Roza Division, Yakima Project, Washington, according to the terms and

(Deposition of Clyde Philp.)

specifications contained in said contract and particularly in accordance with specification 1068 and with respect to Bureau of Reclamation, Department of Interior Contract No. 12r-14825 for earth work, pipe lines and structures, laterals 5.3 and 69.8 and sub-laterals, Roza Division, Yakima Project, Washington, with specifications No. 1602, according to the terms and specifications in said contract contained and provided and particularly in accordance with said specification 1062. Is that question clear, Mr. Philp?

“A. I believe it is.

“Q. All right, what is your answer?

“A. Whatever contractual obligation, if any, is contained in the agreement entered into between Macri & Company and Goerig and Philp in July, 1944. [1552]

“Mr. Holman: Counsel Brown, I call for the production of that.

“Mr. Brown: I haven't the original of that.

“Mr. Holman: All right. Maybe I can identify it.

“Q. (By Mr. Holman): Is that the agreement contained in the answer and cross-complaint of the Defendants Macri as specified in the cross-complaint of the Defendants Macri as the one signed between you and them and a signed copy in your possession, Mr. Philp?

“Mr. Brown: Here it is.

“Mr. Holman: You have a copy?

“Mr. Brown: Yes.

(Deposition of Clyde Philp.)

“Mr. Holman: All right. I will have him identify it.

(Discussion off the record.)

“Q. (By Mr. Holman): Your counsel has produced a copy of that agreement to which you referred?

“A. That’s right.

“Mr. Holman: Will you mark it for identification, please? (So marked.)

“Mr. Brown: That is a copy of the contract that was served and filed under order of the Court as a part of the bill of particulars.” [1553]

Mr. Holman: I think in view of the fact that there are exhibits in evidence now definitely tying both joint venture agreements, and counsel will admit that that is the termination of the agreement, which is also in evidence, I’ll not ask for the production of that particular copy.

Mr. Hawkins: The termination agreement and the two joint venture agreements are in evidence. Mr. Philp in referring to July, 1944, evidently is referring to the termination agreement, as that is the only agreement in July, 1944.

Mr. Holman: That is my understanding.

(Whereupon, counsel continued to read the deposition of Clyde Philp, as follows:)

“Q. (By Mr. Holman): Mr. Philp, I hand you defendant’s and Cross-Complainants’ Exhibit 1 for identification, marked in your deposition today, consisting of five typewritten pages, numbered 1 to 5,

(Deposition of Clyde Philp.)

inclusive; that is the instrument to which you refer, in view of your Counsel's stipulation, is it?

"A. That's right.

"Q. Now is it or is it not a fact that by reference to the contents of this identification 1, there is incorporated by reference an agreement between Sam Macri, Joe Macri and Don Macri, co-partners doing business as Sam Macri & [1554] Company, as first party, and A. J. Goerig, an individual, as second party and Clyde Philp, an individual, as third party, referring to the above contract No. 12r-14825, specification 1062, and also the additional agreement of December 11, 1943, referring to earth work, pipe lines and structures, laterals 70-1 to 80-1 and sub-lateral, East Turbine Laterals, station 260-00 to end and sub-laterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington?

"A. There is mention made of those two in the agreement of July 15, 1944.

"Q. And those prior agreements were executed between the parties that I have indicated, including yourself?

"A. That's right.

"Q. Is there any other written agreement or any other writing in any manner affecting the two latter agreements that I have called your attention to, other than the one you have identified as Defendants' and Cross-Complainants' Exhibit 1 for identification?

"A. Not to my knowledge.

(Deposition of Clyde Philp.)

“Mr. Holman: I call on Counsel Brown to produce any such if they are now available.

“Mr. Brown: Any such——?

“Mr. Holman: Other than this. [1555]

“Mr. Brown: As far as I know there is nothing else in writing.

“Q. (By Mr. Holman): Then it is a fact, is it not, Mr. Philp, that the two agreements of December, 1943, to which I have directed your attention, and Defendants’ Identification 1, is the total written contractual relationship between you and the Defendants and Cross-Complainants Macri with respect to these jobs that I have indicated?

“A. I believe that is right.

“Q. What was the relationship between you and the Defendant and Cross-Complainant, A. J. Goerig, at the time of the execution of the instruments I have previously indicated to you in December, 1943?

“A. We were partners on some jobs——

“Q. I am speaking with respect to these jobs.

“A. We each had an individual interest in this job.

“Q. As indicated by those——

“A. As indicated by the joint venture agreement signed December 11, 1943.

“Q. What if any money have you, Clyde Philp, paid into the performance of the two Federal Projects I have indicated in the previous questions?

“A. I would not know until there is a full accounting on the Stadium Home Project.

(Deposition of Clyde Philp.)

“Q. It is a fact, is it not, that with respect to the Stadium [1556] Home Project there was an additional joint venture agreement?

“A. That’s right.

“Q. Between the same parties as I read before, that is, Macri as the first party and Goerig as the second and you the third?

“A. That’s right.

“Q. Is it a fact that except for contributions, if any, from the Stadium Home Project, there has been no contribution of cash or funds by you or by Goerig to your knowledge to the projects that I have indicated?

“A. That is correct.

“Q. What if any equipment was furnished by you for performance of any of the work of the Roza Projects that I have indicated?

“A. A 1942 G.M.C. pick-up truck.

“Q. Will you indicate in respect to that, Mr. Philp, the ownership, the manner of delivery for work on this job and the time it was on the job?

“A. The truck was owned by Mr. Goerig and myself. I am unable to give the exact time without referring to the records on the length of time it was on said job.

“Mr. Holman: I call on Counsel to produce the record with respect to that pick-up truck.

“Mr. Brown: I have no record. [1557]

“Mr. Holman: I call on Counsel Brown to supplement the deposition by such a document duly

(Deposition of Clyde Philp.)

verified by the party, to be filed supplementing this deposition. Could that be done, Mr. Philp?

“The Witness: Well, off the record.

“(Discussion off the record.)

“Mr. Holman: Now I will ask Counsel Brown if he will do his best in cooperation with his client to furnish that information.

“Mr. Brown: Yes, I will do that.”

Mr. Holman: And may I ask for the production of that, if you have it?

Mr. Hawkins: I do not have it.

Mr. Holman: Will you prepare it?

Mr. Hawkins: I cannot prepare it. I do not have the information.

Mr. Holman: Before proceeding, may I understand that Mr. Brown, your associate, and you, have done your best to comply, and have not been able to furnish that information?

Mr. Hawkins: Well, I haven't done anything about securing that information. Mr. Brown advised me that he asked Mr. Philp to secure it if he could, and nothing further has been done. [1558]

(Whereupon, counsel continued to read the deposition of Clyde Philp, as follows:)

“Q. (By Mr. Holman): Do you know the rental for that truck, Mr. Philp?

“A. Not without referring to the records.

“Q. Nor the time it was there?

“A. Not at this time.

(Deposition of Clyde Philp.)

“Q. And does that include the naked truck or the truck and driver?

“A. It includes the truck only.

“Q. And was that before or after O.P.A. maximum rental regulations, do you remember?

“A. It was after the O.P.A. regulations.

“Q. Can you tell me whether or not that conformed to those regulations, if you know?

“A. They naturally would.

“Q. You think they did, is that right?

“A. I believe they did.

“Q. That is the only item, Mr. Philp?

“A. To the best of my knowledge.

“Q. No materials furnished of any kind?

“A. None that I know of.

“Mr. Holman: I return the witness to you, Mr. Brown.

“Mr. Brown: I have no questions. [1559]

“Mr. Holman: That is all, Mr. Philp, unless you gentlemen want to ask some questions.”

Mr. Holman: That was addressed to Mr. Olson, who was there.

Mr. Hawkins: I might state, your Honor, with reference to that demand made by counsel, there's been no subpoena duces tecum issued by the Clerk to Clyde Philp or to Mr. Goerig, nor has any formal demand been made upon us, nor has any oral demand been made on us up to this time.

Mr. Holman: Since this taking.

Mr. Hawkins: Since this taking.

Mr. Holman: That's correct, your Honor. Your Honor, under the rule as indicated this morning, which upon my calling the same matter to the Court previously was, as I remember, ruled against me, I would like now to read from line 1 on page 13 with respect to Mr. Goerig the following:

Mr. Hawkins: With respect to whom?

Mr. Holman: Mr. Goerig.

The Court: Is this now from Mr. Goerig's deposition?

Mr. Holman: No, this is an admission into the record. [1560]

Mr. Hawkins: Well, I object to that, your Honor. It is not the testimony of Mr. Philp, it is not the testimony of Mr. Goerig, Mr. Goerig is here in Court to testify.

The Court: I can't tell just what you're asking without looking at it.

Mr. Holman: I would like to present to the Court line 1 to line 20, page 13, which would indicate my position, consistent with your Honor's ruling today.

The Court: That's line 1 to 5 there, at the top of the page, is it?

Mr. Holman: I thought it ran to line 20.

The Court: Well, yes, the rest of the page.

Mr. Hawkins: My point is, your Honor, that that isn't the deposition of anybody, and therefore not within the rule.

The Court: It isn't a deposition, but it may be read into the record as a stipulation for what it is worth.

Mr. Hawkins: I understood counsel was offering it under the rule your Honor read, and I don't think it is within that rule. If counsel wants to introduce it as evidence of a stipulation——

The Court: I don't believe it is a deposition; I think it is a stipulation. [1561]

Mr. Holman: I'll read it, your Honor.

(Whereupon, counsel read from page 13 of the deposition of Clyde Philp as follows:)

“Mr. Holman: Mr. Brown, as Counsel for the defendant and Cross-Complainant, A. J. Goerig, do you now stipulate into the record that Mr. Goerig's testimony would be the same as that as given by Mr. Philp,—if Mr. Goerig were here?

“Mr. Brown: Yes.

“Mr. Holman: That is all.”

Mr. Holman: I would like to call Mr. Macri, your Honor, with the purpose in mind of withdrawing him to read the Nelson deposition after lunch.

The Court: Yes, all right. I might ask, Mr. Olson, your purpose in requesting that we wait until your copy comes before reading this Nelson deposition, was that to enable you to examine the copy, or just to have something to follow while it is being read here in Court?

Mr. Olson: Well, I wish to go over it with the thought in mind of being prepared to make objections.

The Court: I see. Well, I think then we should wait, if necessary, the rest of the day.

Mr. Olson: I directed my office to bring it down here to me as soon as it arrives. There should be two [1562] more mail deliveries today.

The Court: Well, you wouldn't have much time to examine it here unless it was during recess.

Mr. Olson: Not unless I get it before noon, that's right, your Honor.

SAM MACRI

one of the defendants, recalled as a witness on behalf of the defendants Macri, testified as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Macri, you are S. M. Macri, or Sam Macri, Sr.? A. Yes.

Q. A member of the co-partnership of Macri and Company? A. Yes.

Q. That being composed of yourself, your brother Joe Macri, and your son Don Macri, correct? A. Yes, sir.

Q. Mr. Macri, will you please tell the Court your personal experience as a general contractor, what have you been doing, and for how long, and what nature of work, and will you kindly talk loud enough and slow enough so that the reporter will get your answers?

A. Well, I've been in the general construction around 26 years, general construction and different type building work, sewer work.

(Testimony of Sam Macri.)

Q. Could you give us some more about it? Get the volume up. [1563]

A. Bridges, highways, disposal plants, and also did several of those defense project work.

Q. Where was that defense work, Mr. Macri?

A. Oh, we built quite a few in Bremerton, about three thousand, was a defense project in Bremerton.

Q. Was that a housing project? A. Yes.

Q. Now, did you have any project at Fort Lewis?

A. Yes.

Q. What was that?

A. Well, that was a complete system, sewer and water main, and included man-holes and catch basins and some reservoirs.

Q. Could you get some more volume there?

A. Well, that was a complete system in Fort Lewis, which was sewer main, water main, catch basin, man-holes, and some reservoirs.

Q. Now, during that period has your time been devoted principally to public works improvements? I mean by that works for the cities and subdivisions and the Federal government, or has your work been for private persons principally?

A. No, we been out on jobs.

Q. That answer I think wasn't responsive. What I wanted to know was whether or not you had worked principally during [1564] that period for public bodies as against working principally for individuals, persons; do you know what I mean?

A. You mean competitive bid?

(Testimony of Sam Macri.)

Q. No, no.

Mr. Olson: Just ask him what he did.

Q. Well, all right, counsel. I want to know, Mr. Macri, if during your twenty-six years' experience you had a major portion or a considerable portion of your experience with either the United States Government or the State of Washington or the counties or the cities or other municipal subdivisions?

A. Well, we did the work for cities, state, and the government, building jobs.

Q. Well, did you also work for private parties, too? A. No, we never did private works.

Q. That's what I want to find out. I don't know whether you mentioned the installation, had you done any installation of water mains? Had you installed water mains? A. Yes.

Q. Had you built bridges?

A. Beg your pardon?

Q. Had you in your experience built bridges?

A. Yes, we built quite a few bridges.

Q. What kind of bridges? [1565]

A. I built for the State Highway, Washington, we built quite a few bridges, and also we built the one across the Lake Union in Seattle, about three miles long.

Q. Across Lake Union? A. Yes.

Q. And where is that bridge, Mr. Macri? What is that bridge?

A. Oh, they call it Ballard Bridge, over in Seattle.

(Testimony of Sam Macri.)

Q. Ballard Bridge, across Lake Union, you constructed? A. Yes.

Q. And will you tell me whether or not your experience has been limited principally to that of a principal operator, or subbing the work from others?

A. Oh, mostly principal. We never sub much.

Q. And will you tell me whether or not principally you have performed the work yourself, or have let it out to sub-contractors?

A. We did the most ourselves, only some of those defense projects we subbed electrical work and plaster and things like that, but the main point we did ourselves.

Q. The main contract you have performed yourself? A. Yes.

Q. Now, what experience, if any, in your construction life had you had with respect to the Roza Project before bidding on specification 1062?

A. Well, I did just one job over there before, some syphon [1566] and ditching.

Q. What was that, please?

A. I did some work on the Roza Project before I did this work here. It consisted of concrete work and re-inforced steel; it was a big syphon, five syphons.

Q. Syphons? A. Yes.

Q. And when was that, about? Do you remember how long ago that was?

A. I'm not sure, but I think it was around 1940.

Q. About 1940?

A. Yes; I don't know just exactly.

(Testimony of Sam Macri.)

Q. Now, prior to 1940 had you made inspection of the various projects advertised for bids, and bid on them, or not?

A. Oh, I been bidding right along here.

Q. How long had you yourself been acquainted with the Roza Project as a continuing construction project?

A. Oh, I been a bidder, oh, I'd say since the last ten years, I been making bids, I'd say mostly every one, and I never was allowed to get any until this syphon.

Q. Will you tell me whether or not your syphon job was completed and accepted by the government?

A. Yes, it was.

Q. And paid for? A. Yes, sir. [1567]

Q. Tell me, please, whether or not in advance of making a bid for specification 1062, schedule 1, you came over here and went into the field with any of the government representatives?

A. 1062?

Q. Yes, sir? A. Yes.

Q. With whom, and when?

A. Mr. Nelson took me over there.

Q. For the purpose of the record, would that be Harold T. Nelson or H. T. Nelson, the engineer in charge? A. H. T. Nelson, yes, sir.

Q. Now, when, about, Mr. Macri, with respect to your bid, did you go into the field with Mr. Nelson?

A. Well, I went into the field with Mr. Nelson before I bid the job, just to show me the location.

(Testimony of Sam Macri.)

Q. At that time were there any of the government stakes in to locate the excavation quantities that were to be removed? Had it been staked then, or not?

A. No, there was no stakes then; they just showed the location.

Q. And did you bid upon the whole of specification 1062, both schedules 1 and 2, or just on one?

A. I bid on both.

Q. And you were the successful bidder on which?

A. On 1062, schedule 1.

Q. And not on 1062, schedule 2? A. No.

Q. At the time that you came into the field can you tell me whether or not there was work being done on an adjoining job to the location of 1062, schedules 1 and 2? A. Oh, yes, there was.

Q. I'm directing your attention particularly to the work of the Murphy-Campbell Company. Was that in progress? A. Yes.

Q. Tell the Court in a general way what they were doing, if you recall?

Mr. Olson: That's objected to as being wholly immaterial, what another contractor was doing on an adjoining job.

Mr. Holman: I'm not going into detail. It is the types of excavations, types of work going on, is all.

The Court: What is the purpose of it?

Mr. Holman: To show his familiarity with the project.

The Court: Well, I'll overrule it.

(Testimony of Sam Macri.)

Q. Did you understand my question? What was the general type of work Murphy-Campbell were doing?

A. It was the same type as 1062; there was ditching and the structures and the open canal. [1569]

Q. And directing your attention to Osberg and Ludberg, can you tell me whether or not they were working at the time you were over there with Mr. Nelson?

A. Yes, they were working.

Q. What were they doing, do you remember?

A. Well, they're working the main canal, the big canal.

Q. And can you tell me whether or not Sather and Son were working at that time?

A. Yes.

Q. What was the nature of their work?

A. Their work was a diversion canal, they call them, a small canal with a concrete lining and structure; they catch some of the water there, what they call a spillway, down somewhere else.

Q. Can you tell me whether or not at that time while on that work and from your previous experience you had had occasion to see the respective types of equipment that were adaptable and being used?

A. Oh, yes, I couldn't help but see that.

Q. Can you tell me what type of equipment Murphy-Campbell were using for digging structures at that time?

A. Well, they had a half yard hoe.

Q. And when you say a half yard hoe, is that the type of equipment Mr. Staples just defined here?

A. Yes, a power shovel and a hoist. [1570]